United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

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United States Court of Appeals

For the Second Circuit

HOWARD BERSCH,

Plaintiff-Appellee,

against

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL AND CO., LIMITED, GUINNESS MAHON & Co., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY & Co. INCORPORATED, J. H. CRANG AND CO., INVESTORS OVERSEAS BANK LIMITED,

Defendants,

ARTHUR ANDERSEN & Co., I.O.S., Ltd., and Bernard Cornfeld, Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York

APPELLANTS' APPENDIX VOLUME III OF THREE VOLUMES

(Pages 209A to 394A)

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MIBTOWN OFFICE 378 FARA AUC WUE NEW YORK INGES

ANJON 10-23 "NUMLATUS PARIS" 386, AVENUE LOUISE PRUSSELS S ITEL 148 60 8-3 20 EXCHANGE PLACE

NEW YORK 10003

BOWLING GREEN 9-8500 CABLE:"HUMLATUS"

August 7, 1969

Securities and Exchange Commission 500 North Capitol Street, N. W. Washington, D. C. 20549

Attention: Mr. Charles E. Shreve, Director Division of Corporation Finance

Dear Sirs:

Drexel Harriman Ripley, Incorporated ("DHR"), Banque Rothschild in Paris, the London merchant banking firms of Guinness Mahon & Co. Ltd. and Hill, Samuel & Co. Limited, Pierson, Heldring & Pierson in Amsterdam, Smith, Barney & Co. Incorporated and perhaps one or more other Continental banking firms (the "kepresentatives") propose to form a group of United States and European underwriters (the "Underwriters") to offer publicly Common Shares of I.O.S., Ltd., a non-resident Canadian corporation (the "Company"). A majority, and perhaps all, of the shares offered in this offering will be newly issued shares and the balance, if any, will be outstanding shares owned by a small number of the Company's shareholders. The aggregate offering price of such shares is expected to be roughly \$74,000,000. Underwriters will agree that none of such shares will be sold in the United States, Canada or Mexico or to U.S. persons as defined below.

At substantially the same time as the above offering there will be two other separate offerings of the Company's shares. One of these offerings is to be managed by Investors Overseas Bank, Limited which is a Bahamian subsidiary of the Company. These shares are to be offered to full-time personnel of the Company and its subsidiaries (some of whom will be citizens of the United States who are resident abroad), to large holders of shares of investment companies managed by the Company or its subsidiaries and to some other persons having business relationships with

Securities and Exchange Commission 2 August 7, 1969

the Company or its subsidiaries. None of these shares are to be offered in the United States or Canada. The price of the shares in this offering is expected to be roughly \$37,000,000.

The third offering is to be made by a group of underwriting firms in Canada managed by J. H. Crang & Co. of Toronto. The shares to be offered by this group will be offered only in Canada to full-time personnel of the Company and its subsidiaries resident in Canada (some of whom will be citizens of the United States) and to large Canadian shareholders of investment companies managed by the Company or its subsidiaries and to a sufficient number of other Canadians to obtain adequate distribution for ultimate listing of such shares on the Toronto and Montreal Stock Exchanges. The maximum offering price of these shares is expected to be about \$12,000,000.

The Company has succeeded to the business of I.O.S., Ltd., (S.A.), a Panamanian corporation organized in 1960. The Company's headquarters are in Geneva, Switzerland and it is engaged, through subsidiaries, in various financial and real estate development businesses, including the management of foreign mutual funds which purchase and sell (largely on national securities exchanges) large amounts of securities issued by United States companies, and the sale of the shares of such funds outside the United States.

The Company is prohibited by an order of the Securities and Exchange Commission dated May 23, 1967, Release No. 34-8083 (the "Order") from engaging in the securities business in the United States. We are informed by the Company that neither it nor any of its subsidiaries nor any of the investment companies managed by it or its subsidiaries engages in business in the United States except that certain of its subsidiaries invest in real estate in this country and one, Investors Development Corporation, Ltd., conducts a real estate sales and management business with respect to real estate located in the United States, principally in Florida.

The Company is also prohibited by the Order from selling securities to United States citizens or nationals, wherever located. However, sales to officers, directors and full-time personnel of the Company or its subsidiaries are specifically excepted from this prohibition.

Securities and Exchange Commission 3 August 7, 1969

A ruling is being requested from the Internal Revenue Service to the effect that an acquisition by a U.S. person of any shares offered by foreign underwriters will result in the U.S. person being subject to the Interest Equalization Tax and that any U.S. underwriter who sells any of the shares (other than shares owned by a U.S. person) to a U.S. person will be subject to the Interest Equalization Tax. It is planned not to allocate any shares owned by a U.S. person to a U.S. underwriter. As a result, it is anticipated that any sale of shares offered by the Underwriters to a U.S. person would result in the payment of Interest Equalization Tax.

The Agreement Among Underwriters will be signed by the Representatives and the several Underwriters outside the United States. The Underwriting Agreement itself will be signed outside the United States. There will be a Selected Dealer Group but none of the dealers in such group (other than United States Underwriters or their foreign subsidiaries) will be United States dealers or foreign subsidiaries of United States dealers, and all the Selected Dealer Agreements will be signed by the Representatives and by such dealers outside the United States. The underwriting accounts will be maintained by DHR in Europe. Offers of shares by the Representatives for sale for the accounts by the Underwriters and offers of shares for sale by each Underwriter, in each case to members of the Selected Dealer Group and to retail purchasers, will originate in Europe. Confirmations will be mailed from Europe. The closing, at which the shares will be delivered to the Underwriters and the Underwriters will make payment for the shares, will be held in London.

Each Underwriter will agree in the Agreement Among Underwriters and each Selected Dealer will agree in a Selected Dealer Agreement that (a) it will not directly or indirectly offer, sell or deliver shares sold by it in the United States of America, or any of its territories or possessions or any areas subject to its jurisdiction (the "U.S.") or in Canada or Mexico or to nationals or citizens of or persons resident or normally resident or, in the case of corporations, incorporated in the U.S. ("U.S. persons") or to others for reoffering, resale or delivery directly or indirectly in the U.S. or to U.S. persons, (b) it will maintain written records of the name, nationality and residence of each person to whom it has

sold shares and, as a condition of the receipt of its shares, will deliver to DHR prior to the closing a certificate listing the number of persons to whom it has sold an confirming that none of such persons is a U.S. person, (c) it will not offer, sell or deliver shares to any person who is not a retail purchaser, an Underwriter, a member of the Selected Dealer Group or a recognized security dealer who is not a United States dealer or a foreign subsidiary of a United States dealer and who agrees in writing to abid by agreements similar to (a) and (b) above, and, (d) it wil if an Underwriter, forfeit an amount equal to the Underwriters' discount and the Selected Dealers' concession and, if a Selected Dealer, forfeit the Selected Dealers' concession in respect of any shares sold by it in violation of the foregoing agreements. Each dealer that is not a Selected Dealer will agree to forfeit the reallowance to which such dealer would otherwise be entitled in respect of any shares sold by it in violation of its above agreement.

We have been advised that procedures designed to preclude the sale of shares in the U.S. and to U.S. persons (other than full-time personnel of the Company) will also be followed by Investors Overseas Bank and J. H. Crang & Co. in the offerings managed by them.

No listing of the Common Shares of the Company on any United States stock exchange is contemplated. Nor is it contemplated that there will be a transfer agent, registrar or paying agent in the United States. It is contemplated that the shares will be listed on the Toronto and Montreal Stock Exchanges but in no event will trading on such exchanges commence earlier than 90 days after the termination of the offering provisions of the Agreement Amon Underwriters relating to the offering of shares by the Underwriters. It is planned that listing applications will be filed with the Amsterdam and Luxembourg Stock Exchanges. It is not believed that listing on the Amsterdam Stock Exchange will become effective until some days after the original distribution is complete, but listing on the . Luxembourg Stock Exchange may become effective at the time of the proposed offering.

On the basis of the foregoing facts furnished to us, we are of the opinion that the proposed offering and sale by the Underwriters as outlined above may be made without registration of the shares to be offered by them under

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Securities and Exchange Commission 5 August 7, 1969

the Securities Act of 1933, as amended. We would appreciate it if you would advise us whether you concur with our opinion expressed in the preceding sentence.

Very truly yours,

213A-/

Document 39 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

A THE ASSESSMENT OF A STREET ASSESSMENT OF THE PARTY OF T PRIORITY TO NORMAL ... GENEVA NEW YORK AUG. 13, 1960 Q. P. BISCHOF COPIES TO: M. VESEL AND J. DE LIEDEKERKE/PARIS GEORGE: THE PROPERTY OF THE PROPERTY O ASSUME YOU PLUS MY AND JDL, OR EITHER OF THEM, WILL ATTEND YOU PLUS MY AND UDL, ON ALLENDANCE PLEASE OF THE PROPERTY OF T ICS MEETING IN PARIS ON AUG. 20 AS SB REPRESENTATIVES. PLEASE · And Switzenskinskinskins ADVISE. REGARDS. 在1000mm 11克加斯克米斯加斯克特特拉拉斯克 J. PERRY RUDDICK SENT BY CORPORATE FINANCE 4. 711 2

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FLVG MSG RECYD FROM GEN:

MSG 25 H KNOVLTON-BA T. GITHENS-BA HILO VESEL-PARIS DE LIEDEKERKE-PARIS

DRESDNER HAS DECLINED I.O.S. CO MANAGER
SHIP AND WILL TELEX POLICY REASONS FOR DOING SO -I HAVE NO FURTHER WORDS ON ADDITIONAL CO-MANAGERS AT THIS TIME -PREPARATION HERE REQUIRE DEFERMENT OF PARIS MANAGERS MEETING TO WEEK OF AUGUST 25TH. WILL ADVISE AS SCHEDULE CLARIFIES - BISCHOF/GEN

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Document 41 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions



CORPORATION FINANCE

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

AUG 2 1 1969

Grayson Murphy, Esq. Shearman & Sterling 20 Exchange Place New York, New York 10005

Re: 1.0.S., Ltd.

Dear Mr. Murphy:

This is with reference to your letter of August 7, 1969 regarding the proposed public offering in Europe by an underwriting syndicate headed by Brewel Harriman Ripley, Incorporated of shares of 1.0.5., Ltd. as well as two additional offerings of the shares of 1.0.5., Ltd. We have nothing further to add to the letter of June ó, 1969 addressed to you from Orval L. DuBois, Secretary of this Commission.

We would like to point out, however, that any sale of I.O.S., Ltd.'s stock to its employees who are nationals of the United States but residents abroad would be subject to the registration requirements of the Securities Act of 1933.

Sincerely yours,

John Heneghan

Assistant Chief Counsel

Document 42 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

HSG 49 King LYOT COPY RUDDICK . THI-YRANKEN RE 103. AT OUTSET OF THIS HORNING'S HEETING DREXEL STATED UNDERWRITING AND SELLING PARTICIPATION WAS REVISED TO 7 1/2 PERCENT FOR DREXEL AND 5 PERCENT FOR EACH CO-HANAGER, WHICH WAS AN OBVIOUS CONCESSION TO YOUR TELEPHONE CALL. I DID HOT THINK 1969 IX 2 17:34 5 PARTICIPATION AT THE MEETING BUT DID HEHTION IT TO COLEMAN AFTERWARDS AS SHITH. BARNEY'S POSITION. I AM SATISFIED THAT DREXEL'S REVISION GIVES PROPER PERSPECTIVE AND VOULD ACCEPT IT UNLESS YOU FFEL OTHERWISE. ACCOUNTING MATTERS ARE BEING RESOLVED APPARENTLY IN A CONSTRUCTIVE HANNER. BICCHOF PAR HU HSG 50 OTC QUOTE COPY BONDS QUOTE PLEASE QUOTE AS OF FRIDAY AUG 29 1969 OBI PHILIPS 4 3/4-1968 SPOONER HINES ORCHAN HINES DENISON MINES MOORE HAC CORHACK THX CHRISTA PAR

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214 A Document 44 of Appendix II to Plaintiff's Memoranduse of Law in Opposition to Defendants' Motions

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

SEP 8 TOS

Shearman & Sterling 20 Exchange Place (New York, New York

ke: 1.0.5., Ltd.

Dear Mr. Hurphy:

This is with further reference to your letter of August 7, 1959, regarding the proposed public offering in Europe by an underwriting syndicate headed by Drenel Harriman Ripley, Incorporated, of shares of I.U.S., Ltd. as well as two additional offerings of the shares of I.U.S., Ltd.

In addition to the matter referred to in our letter of August 21, we would also like to point out that in connection with the part of the offering managed by Investors Overseas Bank, if any of the "larger holders of shares of investment companies managed by the company or its subsidiaries," or any of the "other persons having business relationships with the company or its subsidiaries," are United States citizens or nationals, the prohibitions of the Commission's order of May 23, 1967 would be applicable to any offer or sale to such holders or persons.

Sincerely yours,

John deneghan

Assistant Chief Counsel

Decument 45 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

I.O.S. LTD.

QUESTIONS FOR, ARTHUR ANDERSEN & CO.

- 1. Has the significance of not auditing all of the entities included in the I.O.S. consolidated financial statements been considered and explained in the AA working papers?
- 2. Has AA satisfied itself that All "arranged banking" and similar type transactions have been reflected in the financial statements?



- 3. As a general question, and without being specific as to individual points, did AA take into account in their audit procedures for 1968

 The effect of weaknesses-discussed in their internal accounting control memorandums recently issued on I.O.S. and on the mutual funds that I.O.S. manages.
- 4. Does AA confirm open trades with brokers, particularly relating to sales of securities, as part of audits of I.O.S. managed mutual funds?
- 5. Does AA evaluate the adequacy of taxes on an overall consolidated corporate pasis?
- 6. Do AA audit procedures involve counting securities owned by the mutual funds or obtaining confirmation from the custodian and subcustodians? Do AA satisfy themselves as to the integrity and reliability of the custodians (and the subcustodians) who hold much of the securities for the funds?

- 7. Has AA considered whether 1.0.5.—has—a significant contingent liability to the mutual funds it manages or their shareholders for not processing on a timely basis orders around audit dates, and/or for processing orders throughout the year at possibly incorrect prices? Does AA check fund prices at selected dates throughout the year?
- 8. Has AA considered whether transactions with the Arthur Lipper Corporation and other possibly affiliated parties have been adequately disclosed or other audit procedures or scope changed in light of the disclosure on August 15, 1969 that 1.0.S. had guaranteed as of December 31, 1968 a one million dollar loan made to A. Michael Lipper by Guiness Mahon Does AA audit Guiness Mahon and/or Arthur Lipper Corporation?
- 9. Had the late instructions received by AA to audit the bank group at June 30, 1969 hampered its circularization of accounts, or did AA expect results comparable to those at December 31, 1968 which were poor by U.S. experience standards? Would second requests be sent with respect to the June 30, 1969 audit?
- 10. Has AA considered whether the credits to retained earnings in 1968 and 1969 are in accordance with generally accepted accounting principles applicable in a SEC regulated filling and whether the amounts that were deducted from the gross gains received should be disclosed?
- 11. Had AA considered an audit of the I.O.S. investment program at June 30, 1968 as had been made in prior years?

- 12. Was there significance to there being no opinion by AA on the financial statements of I.O.S. Financial Holdings included in the Investors Bank Luxembourg prospectus?
- 13. Hac AA considered whether the term "trustee" is an accurate description of the relationship in which I.O.S. holds shares and cash for its customers?
- 14. Has AA satisfied itself that full and fair disclosure has been wide in the financial statements as to transactions with G.S. Herbert & Co., a London broker, or the London and Dominion Trust Company both located in the same premises as the Arthur Lipper London offices?

 Does AA audit G. S. Herbert & Co. or London and Dominion Trust Company?

 Are securivies transactions effected at "arms length" prices?
- 15. What is the contingent liability significance of I.L.I.'s
 losing the basic records of 651 insured lives and about \$80,000
 of annual premiums? Are reserves adequate to cover these "lost"
 lives, should there be no premiums received henceforth against future
 death claims?
- 16. Is AA satisifed that GRT (Group reducing term) commission are property recorded? Has AA considered directly circularizing officers and directors of companies in the I.O.S. family about loans and advances to such persons received from the I.O.S. companies rather than indicating audit disclosure limitations imposed by Swiss bank secrecy laws? Should the change in methods in providing actuarial reserves and the amounts be disclosed in the financial statements? Should special reserves be disclosed separately? Should lapsed liquidation proceeds be held as a liability longer than desire before being reflected in income.

- 23. Was AA able to account for the location and ownership of all share certificates of subsidiaries in the "army of companies" included in the I.O.S. group, as referred to in the AA internal control memorand: Were intracompany relationships fully disclosed as appropriate in the circumstances?
- 24. Are unsettled transactions in fund shares analyzed by broker? For example, how great a risk is there with any one broker and how old are the items?
- 25. Was AA satisfied that adequate disclosure was made of the accounting for income on sale of development properties?
- 26. Was the value of the dividend distribution (of \$277,000 face _amount of convertible debentures of I.O.S. Management Limited) determinable at the time of distribution and fully disclosed in the financial statements?
 - 27. Is the borrowing of Mr. Cornfeld from ODB (through Butler Aviation having discounted a \$150,000 note receivable from Mr. Cornfeld) included in the amounts that were due from officers, directors and employees? Did this transaction have implications as to other similar or related loans and if so, were they disclosed?
- 28. Was there/unrecorded liability for volume bonuses at December 31, 1968 and at June 30, 1969 and would adjustment for it have a material effect on prior years income?
- 29. Was consideration given to separate disclosure of givcups in the financial statements?
- 30. Are the relationships and transactions with Ampersand on an arms length basis? Who audits Ampersand?

- 31. Was the reporting by I.O.S. of the dividend receivable by shareholders of record on December 31, 1968 on I.O.S. Management Company stock reasonable in view of the fact that I.O.S. recorded the stock as having been sold before December 31, 1968?
- 32. How does AA consider the reasonableness of carrying values used in a natural resources fund? Does AA audit King Resources?
- 33. Has AA considered the pertinence of consolidating the 100% owned Fund of Funds Proprietary Fund with the accounts of the Fund of Funds and if so, the effect this would have on the 1% expense limitation set forth in the prospectus of the Fund of Funds?
- 34. Should interest be imputed on the amounts due on the IPC and Pension Life sales?
- 35. Does AA audit the IOS pension plan?
- 36. Is there enough time left to carry out all the work necessary before public offering or should there be some delay?

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Hallandala project?

A My recollection is he just gave a general description as to what he knew of it. There was not reports on anything of that sort.

Q Did he give him any financial information at that time?

A Not that I recall, certainly no financial reports.
Whether he cited figures from the top of his head, I don't recall.

Q When did the next meeting take place?

A I would guess on the following week in the IOS offices in Geneva.

Were there any other meetings in New York relating to the ICS offering that you attended?

A I am not sure when you mean.

Q In 1969.

A Yes.

Q When was the next such meeting in New York?

A That would have been after the summer after we had done our work in Europe. I guess that was in early September 1969.

Where was that meeting held?

A That was at Drexel's offices at 60 Broad Street.

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Q Who was present?

A I believe Mr. Field -- Robert E. Field of Price Waterhouse, Robert M. Maynard, Joseph L. Roth and myself and we met with Mr. Coleman and Mr. Ambrose of Drexel and with Mr. Murphy of Shearman & Sterling.

Q Was this one of those meetings in which notes were taken by a person assigned to take notes?

A I would say my recollection is definitely no notes were taker at that meeting.

Q Why is your recollection so definite on that point?

A Because we were discussing a preliminary draft of a report, so the substance of the meeting was, in essence, what the words were going to be in the report and there was nothing else discussed at the meeting other than the report that was on the table, or the draft of the report that was on the table.

Q Who had prepared the draft of the report?

A The Price Waterhouse gentlemen that I previously mentioned.

Q That would be Mr. Maynard, yourself and Mr. Roth?

A And Mr. Field.

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,	And Mr	. F:	ield.		-	-
	Where	was	that	report	prepared?	

I guess, except for Mr. Field, the three of us had started on the report -- or I guess I had started on it initially in Geneva and in Ferney-Voltaire and at times Mr. Maynard and Mr. Roth participated in that, in both Ferney-Voltaire and Geneva and part of the work was done at 60 Broad Street in New York.

What contribution did Mr. Field make?

MR. NOVELLO:

What do you mean by

that, Mr. Silverman?

MR. SILVERMAN: Well, let me withdraw --

I will withdraw that question.

What role did Mr. Field play in the Price Waterhouse investigation of IOS?

MR. NOVELLO:

I will object to the form

of the question, but the witness may answer.

Mr. Field was a member of our policy committee of the firm and he, I guess, assisted as my other partners did in trying to reflect what we had done in words that our client could understand.

I think that's the best way I could describe his role, which is not any different than the other gentlemen

Werblow

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Was he the principal draftsman of the report? MR. BUSCHMAN: I object to the form of the question.

> MR. NOVELLO: I will object to the form,

I would not say that necessarily any cne of us were the principal draftsman.

Mr. Silverman, but the witness may answer.

Who reviewd it? 0

that I have described.

MR. NOVELLO: I object to the form of the question. Go ahead.

Was the report reviewed?

I would say it was reviewed -- I would say that we had a preliminary draft that we discussed with the parties at this first meeting. It was reviewed after that meeting, I would guess, again on a joint basis.

I don't recall that any one of us took a more active part than another in the revision.

But it was reviewed after the meeting at 60 Broad Street that you have just discussed?

Yes. And also -- I mean the purpose of the meeting was to go over the words. Pone part of the revision took place during that meeting and part took place after

223 A -/

Document 47 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

Werblow At Drexel, I am sorry. Q When was the next meeting? 3 I believe that was a Wednesday. I think there was a meeting, possibly two meetings, one morning and one afternoon on Friday of that week in September. I think that was the 12th of September. Where did that meeting take place? 0 At the same place. A Drexel's offices? Q 10 Yes. A 11 Were the same people present? 12 I think so, but I am not sure if all of my part-13 ners were present at that meeting. 14 What was discussed at that meeting? 15 That was another meeting to discuss another draft 16 of the report to Drexel. 17 I guess the meeting was to discuss also a summary 18 of matters that we had discussed with Arthur Andersen to 19 prepare a report to give to Arthur Andersen. 20 What decisions were reached at that meeting? 21 MR. NOVELLO: I object to the form of 22 the question, but the witness may answer. 23

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I don't think any specific decisions were reached at the meeting. We were trying to prepare a report that our client could understand that we though expressed what had transpired and what we had told them at different meetings.

We were trying to get in words pretty much what happens at the conclusion of any job in trying to get a report that has meaning to the recipient. I don't know whether I would characterize that as decisions, but trying to come up with a report that was meaningful to our client and conveyed the views that we had.

MR. NOVELLO: Mr. Silverman, do you think it appropriate to take a short break?

> MR. SILVERMAN: Surely.

> (A short recess was taken.

MR. SILVERMAN: What was the last ques-

tion and answer?

(The record was read.)

And the work on the report to make it meaningful to your client and to convey your views was being done in New York, was it not?

I believe I previously indicated that the work started in Europe and then subsequently was done in New York.

DATE	PLACE	TIME	ACTIVITIES
9/5	New York	3	Telephone conversations with Nangle, Conwell,
	the desired		Browning, Ambrose and Cowett in Geneva
9/8		5	Telephone conversations with Coleman, Nangle, Jowett
÷,			in Geneva, Robert Ball - in Germany
			Conference at Wilkie, Farr with Conwell Memos
9/9		3	Telephone conversations with Ambrose at DHR and Coleman
9/10		4	Telephone conversation with Nangle inParis Conference at DHR with Colema
9/11		4	Letters to Counsel and Grange & Heneghan of SEC Memo re SEC letter
		-	Telephone Conversation with Ambrose, Cohaus (Zurich) Werblau (PW)
9/12	•	6	Conference at DHR
9/15		7	Telephone conversations with Coleman, Field (PW),
			Parker (DHR Pa.), Brown (Toronto), Nangle (Geneva) Feder, Conwell (W.F.),
			Cowett (Geneva), Voran Conference at DHR with PW people and Coleman
9/16		7	Telephone conversations with Moore, Nangle, Bischof (Smith Barney), Joyce in Geneva, Rubenfeld, Field at PW
9/17		7	Telephone conversations with Field (PW), Joyce (Geneva), Cluett (DHR), Coleman, Cowett and Nangle (Geneva)

answer?

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Who did the guts of it.

And then I believe, correct me if I am wrong, that it was turned over to Sullivan & Cromwell.

MR. SCHWARTZ: And we deleted those parts which we thought involved privileged communication.

MR. SILVERMAN: Mr. Schwartz, do you have in your possession a summary sheet without deletions? MR. SCHWARTZ: Yes.

MR. SILVERMAN: Thank you.

Yes. Q

Now, you wanted to refresh your recollection as to where you were on or about September 16th.

On September 16th, I was in New York.

Did you discuss what's been marked as Exhibits 3-A and 3-B with any of the Drexel Harriman personnel?

I really don't remember but as I say, it has some of my handwriting on it but I really don't remember.

Do you recall discussing it with anybody?

Well, I discussed either these or things very similar to these with, I believe, a Mr. Field of Price Waterhouse.

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A Well, I think that Arthur Anderson and Clark
Ambrose, primarily.

Q And from whom were the answers obtained?

A Well, they had discussions, I am sure, in these matters in Geneva and, perhaps, also in New York.

I just don't remember.

Q With whom, in Geneva, did they have discussions?

A I don't remember. I do remember that there
was a fair amount of discussions that went on in Geneva
with the Arthur Anderson people and with the Price
Waterhouse people but I can't pinpoint the times of those
discussions.

Q With whom in New York were there discussions?

A Well, with Mr. Field, I remember, particularly.

It may possibly have been somebody from Arthur Anderson

there. I just don't recall.

Q Anybody else?

A Drexel.

Q Do you know what the substance of these meetings was?

A Well, the substance of the meetings was to discuss the various points that had been raised and to see what kind of a letter or memorandum Price Waterhouse

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felt that they could give to Drexe! as what you might call a comfort letter or comfort memorandum and then in addition to these detailed things, of which there were quite a number, there was an over-all question as to whether Price Waterhouse felt that Drexel could rely on Arthur Anderson's audits of the figures and on this Price Waterhouse, in the final memorandum or letter, indicated quite clearly they found nothing which they felt should prevent Drexel from relying on the work that had been done by Arthur Anderson.

Was there any discussion as to whether Drexel would go ahead with the offering if it didn't receive confirmation from Price Waterhouse that it, meaning Drexel, could rely upon Arthur Andersen's financials?

A None that I recall.

Q Where, to your knowledge, did Price Waterhouse issue its opinion that Drexel could rely upon Arthur Andersen's financial reports?

MR. SCHWARTZ: What do you mean by issue?
MR. ZIRIN: I object to the form.

Arthur Andersen's financials --

MR. SILVERMAN: Reports prepared by Arthur Andersen.

MR. SCHWARTZ: What do you mean by issue?

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223 A-7
Document 50 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

	DATE	PLACE	TIME	ACTIVITIES
	9/17	New York	7.	Telephone conversation with Coliri
	9/18	•	1	Conference with Field, Telephone conversation
				with Vernon, Cowett (Geneva), Levine (SEC), Cluet (DHR), Limmerman (Toronto)
				Two Memos
	9/19	Geneva	9 .	
	9/20	£		
	9/21		2	
	9/22	•	2	
	9/22	New York	6	Telephone conversations with Nangle, Joyce (Geneva), Alterus, Canadian lawyer,
			1	Field, Coleman, Sonne
	9/23		11	Telephone conversations with Browning, Merritt, Joyce (Geneva), Sonne, (Brussels), Coleman, Haft,
				Ambrose (Geneva), SEC Conference Steimle
•	9/24		2 1/2	Telephone conversation with Mynnad (PW), Coleman, Memo - [deleted] Merritt
	9/25		6	Telephone conversation with Boardman - U.S. Bank Notes and Joyce in Geneva
	9/26		5	Telephone conversation with Joyce - Geneva Nangle - Oxford Sonne - Brussels
	* * *		(a)	Bonne - Brussers

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1		223 A - 8
		Murphy 42
2	A	I don't remember.
3	Q	Did you have any telephone conversations with
4	Mr. Haft?	
5	A	Well, I certainly had one setting up the .
6	meeting.	
7	Q	Any others that you can recall?
8	. А	I don't recall.
9	Q	Did you meet with Mr. Haft on a second
10	occasion in	the United States?
11	A	I don't recall.
12	Q	Did you meet with Mr. Haft abroad?
13	A	I don't recall.
14	Q	You testified that you had a meeting with
15	Mr. Stammer	who is Mr. Haft's law partner, is that correct?
16	A	Yes.
17	Q	Did you have more than one meeting with Mr.
18	Stammer?	
19	A	No.
20	Q	Where did your meeting take place?
21	A	In the Carlyle Hotel.
22	Q	Who was present at the meeting?
23	A /	Mr. Coleman and I were present.
24	. Q	Mr. Coleman, you and Mr. Stammer. Anybody

else?

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A Not that I recall.

Q What time of the day did the meeting take place?

A Late in the evening.

Q Approximately when did the meeting take place?

A I think it was on September 23rd.

Q Who arranged the meeting?

A Well, I had tried to get Mr. Haft and he wasn't available so Mr. Stammer came over and talked to us.

Q So then you arranged the meeting?

A Yes.

What was the purpose of the meeting?

A The purpose of the meeting was that that morning an announcement had come out in the press that the SEC was going to have a hearing or bring an action involving the IPC -- that's Investors Planning Corporation -- and Mr. Cowett and Mr. Cornfeld and a number companies and this was just before -- just at the time of the printing in London of the prospectus and we wanted to find out everything we could about this matter and that was the purpose of the meeting. We thought it would be advisable to put a sticker on the prospectus disclosing it.

Q Who made the decision to put a sticker on the prospectus?

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A I think t was -- I am not quite sure what individual did. We'd -- there were several people involved. We had several phone calls to Geneva that evening to talk about it and to try to wore out what should be said and I think it was a joint decision of the people in Geneva and Mr. Coleman, myself and Mr. Conwill.

- Q Did you call Geneva?
- A Yes.
- Q With whom did you peak at Geneva?
- A I think I spoke with Mr. Ambrose. I might have spoken to Mr. Cowett. I am not sure. And this was --- well --
 - Q Who drafted the language of the sticker?
 - A What?
- Q Who drafted the language contained on the sticker?
- A It was a joint operation between those people in Geneva and those -- Mr. Coleman, myself and Mr. Conwill.
- Q Who actually wrote the first draft of the sticker, if you recall?
- A I am not sure who wrote the first draft but we were talking about the thing back and forth on the telephone quite a bit.
 - Q Was there a conference call between you,

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Mr. Conwill and Geneva?

A No, because Mr. Conwill I believe we talked to separately rather than on a conference call.

Q And you spoke to Tr. Conwill reparately?

A Yes.

Q And you spoke to the people in Geneva?

A Well, Mr. Coleman and I.

Q And did you read any language contained in the sticker to Mr. Conwill?

A Well, he said that in his opinion there was no violation of the law and I suppose that it was he that read what he wanted said about that to us because he said we could quote his a that was his firm's opinion.

Q And did you take down what he told you?

A I suppose I took it down.

Q Then did you relay that on to Geneva?

A We talked with Geneva about it because the thing had to be printed in Europe and we naturally discussed with them what would be printed up in Europe.

Q Was the language contained on the sticker typed in this country?

A I really don't remember. It was a very short thing. Whether it was typed or what --

Q Any drafts of the sticker prepared in the --

I'm sorry.

much if it was typed

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A I am sure we didn't have any stenographer with us when we were talking at the Carlyle so I doubt very

Q Did you give consideration to the sticker on the following day?

A I think we shot the works that night.

Q So then by that evening, the language that was contained on the sticker was formulated, approved and fully prepared, is that correct?

A I don't recall any further discussion of it.

There may have been further discussion in Geneva but I

don't recall any here.

Q What else was discussed at the meeting at the Carlyle with Mr. Stammer at which Mr. Stammer was present?

A Nothing except this particular matter.

Q Did you have any occasion to speak with Mr. Stammer on the telephone?

A Well, we asked him to come over to the meeting.

Q Other than the call to arrange for the meeting?

A I don't think so.

Q Did you have any correspondence with Mr.

Stammer?

A I don't think so.

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	223 A - 73
1	Coleman 79
2	agreement among underwriters in New York?
3	A Not that I can remember.
4	Q With any other Shearman & Sterling personnel?
5	A No.
6	Q Did Mr. Murphy fly back and forth from Geneva
7	to New York the way you did in the process of this under-
8	writing?
9	A Yes, he did. He made a number of trips during
10	the summer.
11	Q So sometimes he was in New York and sometimes
12	he was in Geneva?
13	A That would be correct.
14	Was he invited to any executive committee meet-
15	ings during the summer of 1969?
16	A None that I was present at.
	Well, I
17	
18	Q Other than the one you testified to.
19	A I testified to one.
20	Q Did you have any meetings with Mr. Murphy in
21	New York during the summer of 1969 about any matters at
22	all?
23	MR. SCHWARTI: Other than he's testified to?
14	Q Other than what you've testified to.

I remember being with Mr. Murphy once in New

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York and this was, I think, just the day before the offering.

Q Did you discuss the offering with him?

A We discussed a sticker that was-became necessary to attach to the prospectus.

Q What was that sticker?

A You've got the prospectus. I can't remember what it is now.

Q Who said that the sticker had to be attached?

A I--

THE WITNESS: Can I see a copy of the prospectus?

MR. SCHWARTZ: Yes.

A Yes, I remember this now. The SEC had issued an order or orders in connection with give-ups in prior years by a company which was then a subsidiary of IOS and they were threatening to call Cowett and some of the other senior IOS officers to testify before the SEC and this occurred, I think, just the day before the offering and we felt that this had been publicized in the press and that it was something that sh ould be disclosed in the prospectus and Murphy and I discussed this in New York and he had a discussion with the Willkie, Farr firm and it was decided to sticker the prospectus and it was

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	223 A-/F
1	Coleman 81
2	stickered.
3	Q Do you have that sticker in front of you now?
4	A A copy of it.
5	Q A copy of it?
6	A Yes.
7	MR. SILVERMAN: May we have that marked,
8	please?
9	MR. SCHWARTZ: The sticker is part of a
10	larger document, which I believe has some handwritten
11	notes on it.
12	MR. SILVERMAN: Let's just mark the first
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14	Can we separate the first sheet? I don't
15	want to see your notes.
16	MR. SCHWARTZ: This is my personal copy.
17	MR. SILVERMAN: All right, we will get it
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19	MR. SCHWARTZ: You must have one.
2	MR. SILVERMAN: I don't have that sticker.
2	THE WITNESS: The sticker was on all copies
	of the final prospectus.
•	BY MR. SILVERMAN:
	Q Was the sticker prepared in New York?

The language was drafted in New York.

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Sure I was.

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Coleman

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Q Do you know what they were discussing?

A They were discussing what the language of the sticker should be and what Mr. Conwill's opinion was on the importance or lack of importance of the action which the SEC proposed to take.

Q Do you recall what Mr. Conwill stated about the importance or lack of importance of that action?

A I didn't--I wasn't on the telephone, but Murphy reported to me afterwards that Conwill said that he thought that the give-up practices which were the substance matter of the sticker were perfectly legal at the time that they were carried on and that even if they were found to be not legal, that there would be no material harm to IOS.

Q Did Mr. Murphy concur in that opinion?

A I think he took Conwill's word for it. I don't think he had any basis for concurring?

Q Is it fair to say that at the conclusion of the telephone conversation between Mr. Murphy and Mr. Conwill, the language that appears on Coleman Deposition Exhibit 1 was formulated and agreed upon?

A Yes, I believe that's true.

Q Then it is also your belief that that statement which appears on Exhibit 1 was then transmitted in some

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2 | way to Geneva?

A Yes, and I would suggest it was by telephone, because of the time element.

Q You say that one act that underwriters take in connection with the public offering is to question the officers of the issue; is that correct?

- A Yes.
- Q Was that done in the IOS offering?
- A Yes, it was.
- Q Did you participate in the questioning of IOS officers?
 - A I participated in certain phases of it.
- Q Was one such phase the breakfast meeting with Mr. Cowett that you've discussed?

A No, that was not an investigation of the company.

That was discussing--I testified to that a dozen times.

That had nothing to do with the investigation.

- Q You didn't discuss IOS and its operations with Mr. Cowett at that meeting; is that correct?
 - A At that meeting, that's correct.
- Q Was there a subsequent meeting in which you discussed with any personnel of IOS, IOS' operations?
 - A Yes, there were many meetings in Geneva.
 - Q With whom did you discuss IOS' operations?

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223 A-19

Document 52 of Appendix II to Plaintiff's Memorandum of
Law in Opposition to Defendants' Motions

September 29, 1969

Mr. George P. Bischof
Smith Barney & Co., Inc.
1345 Avenue of the Americas
New York, New York 10019

Dear George:

Re: I.O.S., Ltd.

I enclose a proof (September 29) of Closing Memorandum. If you should have any suggestions in regard to this, I would appreciate receiving them as soon as possible.

Sincerely yours,

223 A - 20

September 29, 1969

Mr. Clarke C. Ambrose
Drexel Marriman Ripley Incorporated
60 Broad Street
New York, New York 10004

Re: I.O.S., Ltd.

Dear Clarke:

I enclose three copies of a proof (September 29) of Closing Memorandum. I would appreciate getting any comments that you or others may have on this proof.

Sincerely yours,

Ronald C. Erown, Esq. Blake, Cassels & Graydon 25 King Street, West Toronto 1, Ontario, Canada

Re: I.O.S., Ltd.

Dear Mr. Brown:

I enclose a proof (September 29) of Closing Memorandum. I would appreciate getting any thoughts that you may have on it after you have had a chance to look it over. You will notice that the proof assumes that you will be at the closing in London which I had not cleared with you but which I am inclined to think would be advisable.

Sincerely yours,

Mr. Hugh Sassoon.
Guinness Mahon & Co. Ltd.

3 Gracechurch Street
London E.C. 3, England

Re: I.O.S., Ltd.

Dear Hugh:

I enclose a proof (September 29) of Closing Memorandum. If you should have any suggestions in regard to this, I would appreciate receiving them as soon as possible.

Sincerely yours,

Gilson Gray, III, Esq. Hill, Samuel & Co. Limited 100 Wood Street London, E. C. 2, England

Dear Gilson:

Re: I.O.S., Ltd.

I enclose a proof (September 29) of Closing Memorandum. If you should have any suggestions in regard to this, I would appreciate receiving them as soon as possible.

Sincerely yours,

Mr. Kenneth Martin
The Royal Bank of Canada Trust Corporation
Limited
Brewers Hall
Aldermanbury Square
London E. C.2, England

Re: I.O.S., Ltd.

Dear Mr. Martin:

I enclose a proof (September 29) of Closing Memorandum. If you should have any thoughts or suggestions in regard to this, I would appreciate your letting me know as soon as possible.

Very truly yours,

The Bank of New York 147, Leadenhall Street London E.C.3, England

Re: I.O.S., Ltd.

Attention: Mr. De Pinna and Mr. Stubbs

Gentlemen:

I enclose a proof (September 29) of the Closing Memorandum. If you should have any thoughts in regard to it, I would appreciate receiving them as soon as possible.

Very truly yours,

Robin Eroadley, Esq. Allen & Overy 9-12, Cheapside London EC 2, England

Re: I.O.S., Ltd.

Dear Mr. Broadley:

I enclose a proof (September 29) of Closing Memorandum. If you should have any thoughts in regard to it, I would appreciate receiving them as soon as possible.

Very truly yours,

Thomas R. Nangle, Esq. I.O.B., Ltd. 119 Rue de Lausanne (6th fl.) Geneva, Switzerland

Dear Tom:

Re: I.O.S., Ltd.

I enclose three copies of a proof (September 29) of Closing Memorandum. I am also sending copies to Ken Beaugrand. I would appreciate getting your thoughts on this proof as soon as reasonably possible. I suggest that you go over it carefully with Beaugrand.

Sincerely yours,

Mr. Kenneth Beaugrand 1.0.5 . Ltd. 119 Rue de Lausanne Geneva, Switzerland

at the think a

Re: I.O.S., Ltd.

Dear Ken:

I enclose three copies of a proof (September 29)
of Closing Memorandum. I would appreciate getting any
thoughts which you or others may have in regard to this
proof. I am of course sending copies to Ray Merritt.

Sincerely yours,

223 A-3/SHEARMAN & STERLING

PREDRICK M TATON
MENNY R GUTTHER
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MALTER P PEN'E
RODENT L CLARE JM
THOMAS A CHOIN-ON
WILLIAM RECEPTELER
PARRICK ' GNICANY
WILLIAM RECEPTELER
PAMMET AND MADDEN JM
MANS H ANGERMICELER
JAMET R ROWEN
THOMAS R ANNEL
LAMITON MEDICLE
DAVID T MICOVE NM
R BRUCE MAIN-CONTER
ARTHUR NOCHMAN FIELD
PETER P NITZE
STEPHEN R VOLK
THOMAS Z JEGLER
ROBERT H. MACRINION

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GREVSON M.P MURPHY
ROTIERT N. AS WFS!
JOHN A. M. 150%
HENRY JAMES
GLOBERT REALIN
ERIC M. MAJE!
EMANLES GOOTOWN JR
JOHN A. DEATT
THOMAS F. FENIFELL B.
OMBERT M. ANIGHT
OTTO CROUSE
D. CHRISTIAN UAUS
E. CHARLES C. PARLIN, JR
MICHAEL V. FOURCETAL
WILLIAM D. CARROLL
MAROLD J. CAA
ROTIERT CASSELL
STANLEY I. RUBENTELD
MEMT V. CASSELL
JOHN W. WCINCELY
JOHN E. MOTMAN, JR
ARBIER T. MALCRER
JOHN W. WEISER
EDMARD BRANSILVER
SAMUEL FRANKENHEIM
ALAN M. WRIGHT

CHARLES C PARLIN
JOSEPH W DRANE
C-AUNCEY B GARVER
ANDREV KIRKPATRICK
MIDTOWN OFFICE
JOS PARK AVENUE
NEW YORK 10028
EUROPEAN OFFICES
23, RUE ROYALE
PARIS VIII

ANJOU 10-25

386, AVENUE LOUISE BRUSSELS 5 (TEL) 49. 90 84. "NUMLATUS BRUXELS" NEW YORK 10005

BOWLING GREEN 9-8500

CABLETHUMLATUST

September 29, 1969

Thomas R. Nangle, Esq. I.O.S., Ltd. 119 Rue de Lausanne (6th fl.) Geneva, Switzerland

Dear Tom:

Re: I.O.S., Ltd.

of Closing Memorandum. I am also sending copies to Ken Beaugrand. I would appreciate getting your thoughts on this proof as soon as reasonably possible. I suggest that you go over it carefully with Beaugrand.

Sincerely yours,

GM-PM:ad Enclosure Suy son

DATE	PLACE	TIME	ACTIVITIES
9/29	New York	9	14 Letters distributing proof of IOS Closing Memo Telephone conversations with Gray in London, Merritt,
			Ambrose, SEC, Brown in Toronto
9/30	•	7	Telephone conversations. with Nangle (Geneva), Voran (Geneva), Bischof
*			Volan (Geneva), Dischor
10/1	•	6	Telephone Conversations with Ambrose, Nangle (Geneva) Bischof Conference with Ambrose and
			Browning
10/2		7	Telephone conversations with Rubenfeld, Nangle, Voran in Geneva Conference at DHR
10/3		. 8	Merritt, Haft, Printer, Howe (Toronto), John Stone in Toronto
10/6		10	Telephone conversations with Nangle (Geneva), Ambrose, Sonne - (London), Brown (Toronto), Merritt
10/7		7 1/2	Telephone conversations with Voran, Merritt, Bennett, Nangle, Conference with Voran
10/8	•	8	Telephone conversations with Ambrose, Voran, Bischof, Nangle, Berry (N.Y.) John Stone Conference with Voran
			Telephone conversations with
10/9			Bank of New York (London) Johnstone - (Nassau), Joyce (Geneva)
10/10		8	Telephone conversations with Browning, Joyce, Ambrose and John Stone

Document 56 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

287 1158 /090/ 8581465-1 GZ DD DREXEL Z PARIS

GOOD AFTERMOON SIRS OCTOBER 14, 1969

REFERRING TO YOUR TELEX OF THIS MORNING, WE ARE GIVING YOU HERETO ENCLOSED THE PAYMENT INSTRUCTIONS FOR 1.0.S.LTD ISSUE.

PAYMENT FOR COMMON SHARES OF 1.0.S.LTD PHOCHASED BY YOU FROM OPEXEL HARPIMAN RIPLEY . INCORPORATED & CONFIRMATION HO STYSYSHEY 1335) SHOULD BE MADE IN UNITED STATES DOLLARS BY 1500 HOUPS ON OCTOBER 14 , 1969 TO DREXEL HARRIMAN PIPLEY, INCORPORATED -1.0.S.LTD RETAIL ACCOUNT AT THE BANK OF NEW YORK, 147 LEADENHALL STREET, LONDON F.C. 3 ENGLAND. SUCH PAYMENT SHOULD BE MADE BY INSTRUCTING YOUR NEW YORK CORRESPONDENT TO MAKE PAYMENT IN NEW YORK CLEARING HOUSE FUNDS BY 18. ht HOURS MEN YOPK TIME ON OCTOBER 14, 1969 TO THE BANK OF HEN YORK . STH FLOOR 2988710 STREET, HEN YORK, NEW YORK 19915 CATTENTION: HR DENNIS COUCA). FOR THE ACCOUNT OF THE BANK OF NEW YORK . LONDON- DREXEL HARRIMAN PIPERY. INCORPORATED-1.0.S.LID RETAIL ACCOUNT. YOUR INSTRUCTION TO YOUR NEW YORK COPPESPONDENT SHOULD STATE AS FOLLOWS: "PLEASE PAY AT DR PRIOR TO 10.00 HOURS ON OCTOBER 14, 1969 IN MEN YORK CLEARING HOUSE FUNDS THE AMOUNT OF DOLLAPS .. 18 . 181 .. TO THE BANK OF NEW YORK LONDON - DREXEL HARRIMAN PIPLEY-INCORPORATED 1.0.S.LID RETAIL ACCOUNT. PLEASE SPECIFY IN YOUR PAYMENT ADVICE TO THE BANK OF NEW YORK THAT (INSERT YOUR NAME AND THE CONFIRMATION NO. IS MAKING THE PAYMENT. ...

DREXEL HARRIMAN PIPLEY

PLEASE NOTE THAT PAYMENT IS DUE TODAY IN HEW YORK.

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Tely's Coney

Document 57 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

287 1158 /090/ 8581465-1 GZ DO DREXEL Z PARIS

GOOD AFTERMOON SIRS OCTOBER 14, 1369

REFERRING TO YOUR TELEY OF THIS MORNING. WE ARE GIVING YOU HERETO ENCLOSED THE PAYMENT INSTRUCTIONS FOR 1.0.5 110 ISSUE.

PAYMENT FOR COMMON SHARES OF 1.0.S.LTD PHPCHASED BY YOU FROM DREXEL HARPIMAN RIPLEY . INCORPORATED & CONFIRMATION HO STERNAM 1335) SHOULD BE MADE IN UNITED STATES DOLLARS BY 1500 HOURS ON OCTOBER 14 , 1969 TO DREXEL HAPPIMAN PIPLEY, INCOPPORATED -1.0.S.LTD RETAIL ACCOUNT AT THE BANK OF NEW YORK, 147 LEADENRALL STREET. LONDON E.C. 3 ENGLAND. SUCH PAYMENT SHOWLD BE MADE BY INSTRUCTING YOUR NEW YORK CORRESPONDENT TO MAKE PAYMENT IN NEW YORK CLEARING HOUSE FUNDS BY 18.00 HOURS MEN YORK TIME ON OCTOBER 14, 1969 TO THE BANK OF MEN YORK . STH FLOOR ZOBROAD STREET, HEN YORK, NEW YORK 10015 CATTENTION: HR DEHNIS COUCAS. FOR THE ACCOUNT OF THE BANK OF NEW YORK , LONDON- DREXEL HARRIMAN PIPERY, INCORPORATED-1.0.S.LTD RETAIL ACCOUNT YOUR INSTRUCTION TO YOUR NEW YORK CORRESPONDENT SHOULD STATE AS FOLLOWS: "PLEASE PAY AT DR PRIDE TO 10, he HOURS ON OCTOBER 14, 1969 IN MEN YORK CLEARING HOUSE FUMDS THE AMOUNT OF DOLLAPS ... TO THE ... TO THE BANK OF NEW YORK LONDON - DPEXEL HARRIMAN PIPLEY-INCORPORATED 1.0.S.LTD RETAIL ACCOUNT PLEASE SPECIFY IN YOUR PAYMENT ADVICE TO THE BANK OF NEW YORK THAT (INSERT YOUR NAME AND THE CONFIRMATION NO. IS MAKING THE PAYMENT. ...

DREXEL HARRIMAN RIPLEY

PLEASE NOTE THAT PAYMENT IS DUE TODAY IN NEW YORK.

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Document 58 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Metions

DREXEL HARRIMAN RIPLEY, INCORPORATED

Executive Committee

Minutes of Regular Meeting

September 10, 1969

A Regular Meeting of the Executive Committee was held this day at 11:00 A.M. in the New York Office.

There were present: Messrs. Berry, Coleman, Lloyd, Bell, Cheston and Kelley. Mr. Parker attended as Secretary.

Mr. Parker then reported that Mr. Caliri needed to establish bank accounts with the Bank of New York in connection with the I.O.S., Ltd. underwriting. Adoption of the form of resolution provided by the Bank would enable him to set up the necessary accounts. After discussion of who should be authorized signers on such accounts, upon motion duly seconded, it was

RESOLVED:

- 1. That The Bank of New York (herein called the "Bank"), be and hereby is designated a depositary of the Corporation and authorized to receive for deposit to the credit of this Corporation, or for collection for the account of this Corporation, checks, drafts, notes or other instruments for the payment of money (which shall be deemed to have been unqualifiedly endorsed by this Corporation whether or not actually so endorsed).
- 2. That any one of the following: William E. S. Browning, Ralph M. Caliri, Christian R. Sonne, John G. Rich, Leonard V. Santivasi, Harold W. McCrone, Jr., and J. B. Riggs Parker, be and hereby are authorized, from time to time, for and on behalf of this Corporation to make and sign checks, drafts or other orders with respect to any funds at any time to the credit of this Corporation with the Bank and against any accounts of this Corporation maintained at any time with the Bank, and that the Bank be and hereby is authorized to pay and debit the same to any account of this Corporation then maintained with the Bank, without inquiry as to the circumstances of their issue or the disposition of their proceeds, whether drawn or endorsed to the individual order of,

witman Ripley, Incorporated

September 10, 1969

tendered in payment to the individual obligations of, any officer person signing the same, any other officers of this Corporation therwise, and to receive, as the act of this Corporation, reconments of accounts when signed by any of the above named officers prisons, or their appointees.

3. That any two of the following: William E. S. Browning, with M. Caliri, Christian R. Sonne, and John G. Rich, or any of the following: Leonard V. Santivasi, Harold W. McCrone, and J. B. Riggs Parker, be and hereby are authorized on behalf this Corporation:

To authorize and request the Bank to purchase, exchange, sell, receive, deliver or otherwise deal in or with stocks, bonds and other securities for the account of this Corporation;

To discount with the Bank notes, drafts or other commercial paper, whether or not negotiable;

To apply for letters or other forms of credit on any terms;

To borrow money and to obtain credit or other accommodation from the Bank on any terms;

To pledge, trustee or otherwise create any lien upon or security interest in any property of this Corporation as security for any loan, credit or accommodation from the Bank;

To enter into any agreement relating to any genera or specific transaction with the Bank; and in connection with any of the foregoing, in the name and on behalf of this Corporation to accept, receive, withcraw or waive notices, demands, protests, vouchers, papers or property and to make, execute and deliver such notes, obligations, guarantees, instruments, assignments, receipts, waivers, acquittances, indemnities or other agreements pertaining thereto as the officers or persons acting pursuant to this authorization may in their discretion deem advisable.

September 10, 1969

- 4. That the Secretary or Assistant Secretary of this Corporation be and hereby is authorized and directed to certify to the Bank the names of the present officers of this Corporation and other persons authorized to sign for it, and the offices respectively held by them, together with specimens of their signatures, and from time to time hereafter, aschanges in such personnel are made, immediately to certify such changes to the Bank, and the Bank shall be fully protected in relying on such certifications and shall be indemnified and held harmless from any claims, demands, expenses, loss or damage resulting from or arising out of honoring any signature so certified or refusing to honor any signature not so certified.
- 5. That the Secretary or an Assistant Secretary of this Corporation be and hereby is authorized and directed to certify to the Bank that this resolution has been duly adopted, is in full force and effect and is in accordance with the provision of the charter and by-laws of this Corporation.
- 6. That any withdrawals of money or other transactions heretofore had on behalf of this Corporation with the Bank be and hereby are ratified, confirmed and approved, and that the Bank be and hereby is authorized to rely upon the authority conferred by this resolution until the receipt by it of a certified copy of a resolution of this Board of Directors revoking or modifying the same.

Document 63(a) of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

DREXEL HARRIMAN RIPLEY, INCORPORATED

Executive Committee

Minutes of Regular Meeting

May 14, 1969

A Regular Meeting of the Executive Committee was held this day at 11:00 A.M. in the Philadelphia Office.

There were present: Messrs. Berry, Coleman, Miller, Cluett, Lloyd, Bell, Cheston, Guernsey and Kelley. Mr. Parker also attended as Secretary.

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Document 63(b) of Appendix II to Plaintiff's Memorandum of
Law in Opposition to Defendants' Motions

Messrs. Browning and Sonne made a presentation relating to the proposed underwriting of I.O.S., Ltd. (S.A.).

There being no further business, the meeting adjourned.

Secretary

*ttachment:

Commitment Committee Report - 5/9/69 - ?

DREXEL HARRIMAN RIPLEY, INCORPORATED

Executive Committee

Minutes of Regular Meeting

August 27, 1969

A Regular Meeting of the Executive Committee was held this day at 11:00 A.M. in the Philadelphia Office.

There were present: Messrs. Miller, Cluett, Lloyd, Morehouse, Cheston and Kelley. Mr. Parker attended as Secretary.

The status of the I.O.S. underwriting was discussed.

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Document 63(c) of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

Telex

Mr. Edward M. Cowett

10S Geneva

Re listing LTD. Toronto and Montreal exchanges, I cuote Drexel Harriman via Grayson Murphy. "Love to help you but -----". Therefore listing will take place Monday December 29th. For publicity purposes it would be helpful if someone like yourself or James Roosevelt could be on the floor of the exchange that morning. However, if no one is available from Geneva I will ask Ira Weinstein to come up. Please let me know.

Regards.

Murray Howe.

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Document 64 of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

Drexel, Harriman, Ripley, Incorporated 60 Broad Street New York, N. Y. 10004

Dear Sirs:

During our investigatory work carried out in connection with your proposed public offering of _____ shares of common stock of I.O.S. Ltd. we had occasion to refer to the working papers of Arthur Andersen & Co. supporting their examination of I.O.S. Ltd. for the year ended December 31, 1968. Our reference to these papers was solely to obtain information concerning the company's operations and its accounting practices. Only incidentally did we take notice of the audit procedures followed by Arthur Andersen & Co. in the course of their examination. Certain questions which related to the audit procedures, however, were raised by us and were discussed with Arthur Andersen & Co.

We did not attempt, nor would we have agreed to attempt to review the Andersen working papers to provide assurance that Andersen's examination could be relied upon. An audit involves a great deal of judgment, a background knowledge of the company's operations, internal procedures and controls and its personnel; it cannot be loked at or criticized in segments because of the unavoidable and necessary interrelationship between segments. Additionally, an audit involves intangible standards of independence and of field work, such as training and supervision of personnel, etc., which cannot be evaluated by reference to working papers.

Nevertheless, we understand that our discussions with you raised some questions as to the reasonableness of your relying on the authority of Arthur Andersen & Co. as experts in giving their report.

which the questions related nor anything else came to our attention during the course of our reference to the working papers that would cause us to believe that the examination of the financial statements of I.O.S. Ltd. at December 31, 1968 by Arthur Andersen & Co. was not made in accordance with generally accepted auditing standards or would give you any reason not to rely on such examination.

This letter relates only to auditing matters and reference is made to our letter to you dated September , 1969 that sets forth our view that it appears that the credits to retained earnings shown in the consolidated financial statements of I.O.S. in 1968 (\$) and 1969 (\$) should be included in the net income in accordance with generally accepted accounting principles as that term is understood in the United States.

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Document 69(b) of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

September 17, 1970

Allan S. Mostoff, Esq.
Associate Director
Division of Corporate Regulation
Securities and Exchange Commission
Washington, D.C. 20549

Re: I.O.S. Ltd.

Dear Mr. Mostoff:

In your letter of August 27. 1970 you requested certain information relating to Americans known to have purchased common chares of I.C.S., Ltd. pursuant to a public offering in September 1969. As stated in my letter to you of July 29, 1970, at the time of the public offering every effort was made to protect against sales to Americans other than employees, associates, officers, directors or individuals having a continuing business or professional relationship with 103. In recent telephone convercations you have expressed a desire to have made immediately available to you the requested information pertaining to the individuals who fall into the last category mentioned.

Members of the IOS legal staff have reviewed the files of the company and we have obtained the following information. As of this date, a continuing in depth review of the files is being made and it is conceivable that certain additions may be made to the following list. Should we receive any additional information from IOS, we will, of course, immediately forward it to you for your review.

The following are to the best of our present knowledge all the United States citizens falling within the last category mentioned above:

1. Allan F. Conwill 481 Carlton Road Wyckoff, New Jersey 200 shares

Mr. Conwill, a member of the law firm of Willkie Farr & Gallagher, United States Councel to IOS, is a member of the boards of directors of The Fund of Funds, Limited, IOS Growth Fund, Limited and Investors Overseas Services Management Limited.

2. J. Clarence Davies, Jr. 1,000 shares 331 Hadison Avenue New York, Hew York

Mr. Davies is a director of Investment Properties International, Limited, a closed-end company managed by IOS affiliates.

3. Eric Draw
1000 Masonic Building
13 Shiba-Sakae-Cho
Nimato-Ku Tokyo 105
Japan

1,426 shares

Mr. Drew is associated with Investors Planning Corporation.

4. Arthur A. Feder 25 West Slat Street New York, New York 1,000 shares

Mr. Feder, at the time of the public offerin; was a member of the firm of Willkie Farr & Gallagher and an officer and director of various of the real estate subsidiaries of 103. Early in 1970, Mr. Feder resigned as a member of the law firm and accepted the position of Executive Vice President and General Counsel of 103 Real Estate Holdings Limited.

John "Tex" McCrary
Intertel Limited
161 East 61st Street
New York, New York

1,000 shares

Mr. McCrary, at various times, has served as an independent consultant, on public relations matters, to the IOS group of companies.

Allan S. Mostoff, Esq.

6. Raymond W. Merritt, Esq. 1,400 shares 444 East 20th Street New York, New York

Mr. Marritt, a member of the first of Willkie Farr & Gallagner, is presently a director of I.O.S., Ltd. At the time of the public offering Mr. Merritt was in officer or director of various companies in the IOS group.

7. Harold Rosen 500 shares
136 South Pourth Street
Louisville, Kentucky

Mr. Rosen is a director of Investors Development Corporation, part of the IOS real estate group of companies.

8. George A. von Peterffy 31,000 chares 6 Coolidge Road Cambridge, Massachusetts

At the time of the public offering Nr. von Peterffy was a director of I.O.S.; Ltd. He no lenger occupies that position.

9. Wilson W. Wyatt 1,000 shares
Wyatt Graften & Sloss
Marien E. Taylor Building
Louisville, Mentucky

Mr. Wyatt, a member of the firm of Wyatt Grafton & Sloss, a law firm which sometimes acts as Counsel to ICS, is a director of I.O.S., Ltd. as well as a director of The Fund of Funds, Limited and IOS Growth Fund, Limited and IOS Regent Fund Limited.

As I indicated in our telephone conversation, IOS is in the process of gathering the information you have requested in regard to all Americans who purchased at the time of the public offering.

As soon as that information is available, we will forward it to you. In the interim, if we can be of any further assistance, please feel free to contact the undersigned.

Very truly yours,

228 A-1 Document 69(e) of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions Common och fill December 15, 1970 Allan S. Mostoff, Esq. Associate Director Division of Corporate Regulation Securities and Exchange Commission Wash ington, D.C. 20549 Re: I.O.S., Ltd. Dear Mr. Kostoff: This letter is in response to your letter of September 25, 1970 in which you reiterated your request for information relating to Americans known to have purchased common shares of I.O.S., Ltd. upon the public offering in September 1969. Annexed hereto are: (a) Exhibit A, listing approximately 360 Americans known to have purchased common shares. This Exhibit, based upon information provided by our client, reflects the names of the individuals involved, their last known addresses, the number of shares acquired by each and the relationship each individual had with one or more companies in the IOS Group at the time of the public offering. As we stated in our letter of July 29, 1970, since the public offering a number of these purchasers have undoubtedly disposed of their holdings. Furthermore, a number of them have terminated their association with the IOS Group. (b) Exhibit B, comprising a list, based upon information provided by Nontreal Trust Company, the transfer agent for I.O.S., Ltd., setting forth, as of September 30, 1970, the names, addresses and number of shares owned by each of those shareholders residing in the United States. As we have pointed out in prior correspondence, it is likely that many holders of IOS The state of the s

Allan S. Mestoff, Esq.

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December 15, 1976

common stock have their securities represented by bearer shares. Thus, Exhibit B only relates to those Americans who are listed on the records of the transfer agent.

In our letter to you of September 17, 1970, we enumerated certain American individuals having a continuing business or professional relationship with IOS who also purchased common shares. Our client has advised us that the information provided in that letter in relation to Mr. Eric Drew requires correction.

Fr. Drew was described in our letter as being associated with Investors Planning Corporation. Investors Planning Corporation. Investors planning Corporation. Investors planning Corporation and as of Nay 22, 1969 was a Full-time employee of Piedmont International Limited. Piedmont International Limited. Piedmont International Limited planning Corporation from I.O.S., Ltd.

Our client has also advised us that o'reals additions should be made to that letter and these are set looks in Exhibit C.

Thus far our client has been unable to satisfactorily identify two acquirers of common shares. These two, "Paul Borresen and Mrs. Britomart" apparently acquired 128 common shares as co-ewners. At the time of their acquisition they listed their address as: c/o USAID, 1680 Rocas Blvd., Manila, Phillipines.

Members of the IOS legal staff are continuing their efforts to ascertain the relationship of these two individuals to IOS. As soon as this information is available, we shall forward it to you.

It should be noted that all common shares acquired by the individuals set forth in my letter of September 17, Exhibit A and Exhibit C (as well as Paul Borresen and Fro. Britomart) acquired shares which were distributed in the Secondary Offering managed by Investors Overseas Bank Limited, a Bahamiar bank. None of these individuals was permitted to subscribe for shares offered by the underwriting syndicates in Canada or Europe. All subscriptions in this secondary

Allan S. Mostoff, Esq. -3- December 15, 1970

offering were controlled by and handled through the facilities of Investors Overseas Bank.

We believe that the foregoing material is in compliance with your various requests. If we can be of any further assistance in regard to this matter, please feel free to contact the undersigned.

Very truly yours,

John S. D'Alimonte

JSD:ds Enclosures AIR MAIL

BCC: Calvin H. Cobb, Esq.
Jay P. Leary, Esq.
Raymond W. Merritt, Esq.
Bruno Lederer, Esq.

Document 69(f) of Appendix II to Plaintiff's Memorandens EXHIBIT Conference of Law in Opposition to Defendants' Motions

1. Robert Sutner 460 Park Avenue New York, N.Y. 1000 shares

Mr. Sutner was at the time of the offering and still is a director of I.C.S., Ltd. and certain of its subsidiaries. In addition, Mr. Sutner is the Chairman, Chief Executive Officer and sole stockholder of SAJA Associates Ltd. ("SAJA"). The activities of SAJA are discussed below. Prior to his association with SAJA. Mr. Sutner was President of Investors Planning Corporation.

2. Morton I. Schiowitz 460 Park Avenue New York, N.Y. 1000 shares

F. 2

officer and/or director of various companies in the IOS Group.

In addition, he was a director, president and sole stockholder of Ampersand Business Consulants, Inc. ("Ampersand"). The activities of Ampersand are discussed below. Prior to his association with Ampersand, Mr. Schiowitz was a senior executive of various companies in the IOS Group.

3. Raymond Grant 444 Madison Avenue New York, N.Y. 1000 shares

Mr. Grant was, at the time of the offering, the
President and an executive employee of SAJA. Prior to that,
Mr. Grant had been an officer of Investors Planning Corporation.

4. Hyman Feld 315 Castle Drive Englewood Cliffs, N.J. 1000 shares

At the time of the offering, Mr. Feld was an executive employee of Ampersand. Prior to that, Mr. Feld had been an executive of Investors Continental Services.

5. Howard Bersch 460 Park Avenue New York, N.Y. 600 shares

Mr. Bersch was, at the time of the offering, the Secretary and an executive employee of SAJA.

 Philip Gordis 460 Park Avenue New York, N.Y. 1000 shares

Mr. Gordis, at the time of the offering was an executive employee Ampersand and was an officer or director of certain companies in the IOS Group.

7. David Ellner 460 Park Avenue New York, N.Y. 600 shares

At the time of the offering, Mr. Ellner was an executive employee of Ampersand. Prior t that time, Mr. Ellner had been an employee of the IOS Group.

8. Christine Cullen 460 Park Avenue New York, N.Y. 140 shares

Miss Cullen was, at the time of the offering, employed by SAJA as Mr. Sutner's executive secretary.

9. Simme Arthur 460 Park Avenue New York, N.Y. 400 shares

Miss Arthur was employed by Ampersand as Mr. Schiowitz' executive secretary at the time of the offering.

10. Carol Breidenstein
13, rue de Versoix
01 Ferney-Voltaire
France

91 shares

At the time of the offering, Miss Breidenstein was employed by Ampersand as Mr. Ellner's executive secretary.

11. Julie Crews
39 Avenue General Guisan
1009 Pully
Geneva, Switzerland

159 shares

Miss Crews was at the time of the public offering, working as a file time research analyst for the benefit of the various funds in the IOS Group. She had functioned in this capacity for some time prior to and after the offering. She apparently was an employee of Emmanuel Deetjen & Co. assigned to this activity.

12. Gilbert Konowitz
460 Park Avenue
New York, N.Y.

270 shares

At the time of the public offering Mr. Konowitz was an independent purchasing consultant engaged by IOS.

Until September 1969, Mr. Konowitz had been an employee of IOS working in Geneva, Switzerland.

13. Claire Pipolo 460 Park Avenue New York, N.Y. 150 shares

At the time of the public offering Miss Pipolo was employed by SAJA as Mr. Grant's executive secretary.

SAJA Associates Ltd. is a New York corporation all of the outstanding shares of which are owned by Mr. Robert Sutner. SAJA was a business and management consulting firm and was frequently engaged by IOS, its principal client.

Ampersand Business Consultants, a corporation whollyowned by Morton I. Schiowitz, was a business and management
consulting firm frequently engaged by IOS, its principal
client.

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Document 69(g) of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

July 29, 1970

Mr. Allan S. Forteff Associate Director Division of Corporate Perulation Securities and Exchange Commission Washington, D.C. 20549

Re: I.O.S., Lt4. (S./.) ("IOS")
Your File No. HO-305 (CF 132-3

Dear Fr. Fostoff:

In recent correspondence with Sevmour Meinsen of the firm of Colenbeck & Parell, you requested certain information relating to the number of Avarious who are holders of the securities of TOC. You further requested that, in compiling such information, American employees of TOC be separated from other American citizens or United States companies known to hold or own TOC stock.

IOS has recently requested that this firm forward this information to you.

At the time of the public offering of its Common Theres, ICS and the underwriters went to creat lengths to ensure that no sales were made to Americans other than employees, associates, officers, directors or individuals having a continuing business or professional relationship with ICS ("ICS incrican persons").

Upon the public offering of IOS Common Shares, approximately 385 IOS American persons nurchased Shares. To the heat knowledge of IOS no sales to other Americans were made. Since that offering, unfouttedly a number of these purchasers have disposed of their holdings. In addition, it is nossible that some of these individuals no longer are employed by or associated with IOS.

Fr. Allan S. Mostoff

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July 30, 1970

Fany Common Chares of ICS are held in the form of bearer share warrants, making it impossible to determine the ownership thereof. Furthermore, as to the remistered shares, the Transfer Agent, Montreal Trust Company, maintains records only of names and addresses of holders but not citizenship. We are inferred by the Transfer Agent that, as of June 19, 1970, their records show 32 individuals or companies, with addresses in the United States, as holders of Common Chares. Of this number, 16 are included in the number of IOS American persons referred to above who purchased at the time of the offering.

The foregoing is, to the best of our information and belief, accurate information concerning the common shares of T.O.S., Ltd. We assume that your request for information does not encompass a request for comparable information as to the preferred shares of T.O.S., Ltd., which preferred shares have been issued nursuant to the IOS stock option plan.

T.O.S. has instructed us to advise you that this firm will reply to various requests made by the Commission for information.

Therefore, if we can be of any further assistance in connection with this or other matters, please contect the understanded.

Very truly yours,

John 8. D'Alimonto

JSD:kar.

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NAME & ADDRESS	NUMBER OF SHARES	RELATIONSHIP WITH IOS IN SEPTEMBER 1969
Patrick J. Sheehan 23 Le Crest de Vaulx 74 Gaillard, France	180 Shs.	employee
David L. Sherman Villa Ross Ol Grilly, France	160 Shs.	employee
Jack D. Shinneman Chalet Plein Soleil Ol Divonne-Les-Bains, France	160 Shs.	employee
Dougal Smith Ol Echenevex, France	600 Shs.	employee
Michael Spitzer Residence du Parc, Rue de Fossard 74 Gaillard, France	120 Shs.	employee .
Raymond Stults Villa Bellevue Ol Noens, France	200 Shs.	employee
Frank W. Taylor Villa Zigliotto Ol Villard-Tacon, France	135 Shs.	employee
Paul Tillotso 1315 East Hebraska Avenue Peoria, Illinois 61614	420 Shs.	<pre>employee</pre>
Juanita Torres Nocl Torres 50 Rue de Moillebeau 1202 Geneve, Switzerland	278 Shs. 200 Shs.	employee
Jerome Uslaner Chemin de la Lose 50 rue de Moillebeau 1 Commigny, Vaud Switzerland	800 Shs.	employee
Robert van Lydegraf Villa Pascotti Gland, Vaud, Switzerland	140 Shs.	employee
Andre Waksman c/o J. Waksman, 2937 Shore Parkwa Brooklyn, N.Y.	231 Shs.	employee
Edward T. Whiteraft Villa Kicole Ol Pregnin, France	130 Shs.	employee

Document 69(j) of Amendix II to Plaintiff's Memorandum of Law in Op ition to Defendants' Motions

October 1, 1969

Memorandum for Files

Re: I.O.S. - Clore Forgan, Wa. R. Staats Inc.

This morning as part of a telephone conversation with Bertram Coleman, I heard about the possible purchase of some shares of common stock of I.O.S., Ltd. by the Denver office of Glore Forgan, Wm. R. Staats Inc. Later I had a visit from Scott Cluett on the same subject. WSC informed me that a telephone call had come into our . Syndicate Department yesterday, Tuesday, September 30, 1969, from an individual in the Denver office of Clore Forgan who indicated that he had a client who wanted 10,000 shares of I.O.S., of which he had purchased 2,000 shares from a Canadian firm and was looking to buy 8,000 more. This individual wanted to know if DHR could help him find the additional 8,000 shares to fill the order. WSC reported that he could not help him and suggested that the Glore Forgan representative consider breaking the trade in view of possible problems with the S.E.C. inasmuch as the shares had not been registered in the U.S.

After hearing about this from WSC, I made a telephone call to Archie Albright, president of Glore Forgan, and told him what I knew of the transaction, including the fact that the S.E.C. frowned very much on this type of activity. About an hour and a half later, I had a call back from Mr. James H. Lynch, Jr., vice president and secretary of Glore Forgan, who said that he had looked into this matter and that one of his assistants, Mr. Jacobson, had talked with the S.E.C. about this. Mr. Lynch did not recall with whom Mr. Jacobson had talked. He described Mr. Jacobson as formerly with the S.E.C. Mr. Lyuch reported that our name was not mentioned to the S.E.C. because he saw no point to it and that he had described this to the S.E.C. as an isolated transaction. The individual at the S.E.C. reportedly said, "If you say this is an isolated transaction, all right. But two such transactions would not be viewed as being 'isolated'" (or words to that effect).

Mr. Lynch also said that he had spoken with his Denver office and the rest of the order had been cancelled. With respect to the 2,000 shares purchased for the client, Mr. Lynch was going to endeavor to induce the purchaser to break the transaction and said he would advise me whether he succeeded. About fifteen minutes later I phoned Mr. Lynch again and asked him if he would care to divulge the name of the Canadian firm who sold the securities. The name he gave me was Collier, Norris & Quinlan.

Clarke Ambrose

(TD.

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Document 70(a) of Appendix II to Plaintiff's Memorandum of Law in Opposition to Defendants' Motions

.Memorandum To:

HK, Jr.

GAV

August 29, 1969

RAP

Jdel.

TFG

9de W

MV

RSR

MFB

Attached is a draft of an all office memorandum stating generally the nature of the IOS offering and spelling out the procedures involved. It is important that everyone be aware of and follow these procedures without exception, in the event that the SEC should ever question us in the future.

If you have any questions or comments, please let me know as we are finalizing the provisions of the underwriting agreements.

George P. Bischof

ALL OFFICE MEMORANDUM

September 8, 1969

IOS

I.O.S., Ltd. (Investors Overseas Services)

Common Shares

I.O.S., Ltd., the parent of the I.O.S. group of companies, plans to issue ______ new Common Shares through a syndicate managed by Drexel Harriman Ripley (lead); Banque Rothschild S.A.; Guinness Mahon & Co., Ltd; Hill Samuel & Co. Ltd; Pierson, Heldring & Pierson; and Smith, Barney & Co. Incorporated. IOS, an international sales and financial service organization, is engaged in the sale and management of mutual funds and in banking, life insurance and the sale and management of real estate investments and properties. In terms of sales volume, the Company is the largest distributor of mutual funds and related equity investment products in the world. Consolidated net income increased from \$1.7 million in 1964 to \$14.4 million in 1968. Unaudited consoldiated net income for the latest twelve months ended June 30, 1969 was \$19.4 million.

The Company attributes its success in large measure to its sales organization which now numbers in excess of 13,000 person. The Company employs more than 3,000 executive and administrative personnel to support the sales force and to service its more than 800,000 fund investors, bank depositors and insurance policyholders. The Company maintains its principal executive offices in Geneva, Switzerland and has more than 200 regional sales, administrative and information offices throughout the free world. The business of the Company had its origin in a mutual funds sales business founded by the Company's chief executive officer, Mr. Bernard Cornfeld, in Paris in 1956.

Two other separate offering of IOS Common Stock are also being made:

Common Shares are being offered in Canada and through an IOS bank to certain employees and IOS fundholders. The total number of Common Shares to be sold is _____, of which ____ are being sold by selling stockholders. The principal purpose of these offerings, which in the aggregate will involve about 20% of the Company's outstanding capital stock, is to establish a market for IOS, Ltd. Common Shares, which has not heretofore existed. It is contemplated that the Company will use its proceeds from these issues to develop and expand its activities, principally in the banking and insurance areas.

Offering Schedule:

Telex Date: September 8th

Preliminary Indications: September 17th

Final Indications: September 19th Offering Date: September 24th Closing (London): October 15th

Restrictions on Offerings: The Common Shares will not be registered under the U.S. Securities Act of 1933. Furthermore, IOS, Ltd. is prohibited by an Order of the SEC, dated May 23, 1967, from selling any of its shares, directly or indirectly, in the U.S. or to U.S. citizens or residents. Therefore, it is absolutely essential that we strictly observe the prohibitions on offerings and sales which are set forth in the Underwriting Agreement and the Agreement Among Underwriters.

- 1. All Underwriters and Selected Dealers, as well as other recognized securities dealers who putchase Common Shares from Underwriters or Selected Dealers, will be required to execute and deliver to the lead manager, as a condition to the receipt of any of their Common Shares, a certificate that they have not directly or indirectly offered, sold or delivered any of the Common Shares sold to retail purchasers, including individuals, institutions, advisory accounts and own investment accounts: (a) in the U.S. or any of its territories or possessions or any areas subject to its jurisdiction; (b) in Canada or Mexico; (c) to nationals or citizens of or persons resident or normally resident in the U.S.; (d) to partnerships or associations any of whose partners or members are U.S. persons; or (e) to corporations incorporated in, domiciled in or having their principal place of business in the U.S. or which are controlled by such corporations, U.S. persons or U.S. partnerships or associations or U.S. corporations. If an Underwriter sells to another Underwriter or to a Selected Dealer, or to a recognized securities dealer who is not an Underwriter or Selected Dealer who must be a recognized securities dealer whose principal place of business is outside the J.S.), it must require such Underwriter or Selected Dealer to fill out, execute and deliver to it a similar certificate.
- 2. The Underwriters will agree to keep written records of: (a) the name, address, country of residence and nationality of each individual purchaser of Common Shares, (b) the name and address of each partnership and association which purchases Common Shares and the name, nationality and country of residence of each partner or member thereof, and (c) the name, address, country of incorporation and country of domicile of each corporation which purchases Common Shares. The Underwriters will also agree that they will, upon demand prior to December 31, 1973, furnish within 90 days a certificate of their independent accountants confirming

the statements made in the Certificate.

- 3. IOS, Ltd. desires to obtain a broad distribution of the Common Shares; accordingly, not more than 1,000 shares may be sold to any individual retail purchaser and not more than 10,000 shares to any one institutional investor (not including sales to other Underwriters, Selected Dealers or recognized securities dealers).
- 4. No sales of any Common Shares may be made to any director, officer, full time employee or associate of IOS, Ltd. or any of its subsidiaries or affiliates, or a member of such person's immediate family.
- 5. No action has been taken to permit a "public offering" of the Common Shares in any jurisdiction where action for that purpose is required; therefore, all limitations governing a private placement as that expression is understood in each jurisdiction in which we may offer or sell Common Shares or distribute any prospectus must be observed. In particular, we will not transmit copies of a Prospectus to more than twenty persons situated in Belgium.

Communications and Confirmation: This offering is being effected entirely outside the U.S. No prospectus will be available except at our offices in Paris, London or Geneva, and all inquiries from customers or otherwise should be referred to those offices. In addition, all confirmations to retail and other authorized purchasers must be sent out from an office outside the U.S.

Listing Applications: Application will be made to list the Common Shares and/or the bearer instrument representing such shares, on the Luxembourg, Amsterdam, Toronto and Montreal stock exchanges.

George P. Bischof

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Document 70(b) of Appendix II to Plaintiff's Memorane of Law in Opposition to Defendants' Motions

FOR OFFICE USE ONLY

Secondary Insuo

For Use with Offering Prospect:s

\$15,660,000.

I.O.S., LTD.

(Incorporated under the laws of Canada)

1, '50,000 Common Shares

(Par value of 25¢ U.S. currency each)

ISSUE PRICE - \$10.80

SHARES OFFERED

The total number of common shares to be sold in the offering is 10,992,000 of which 5,600,000 are new shares and 5,392,000 are being sold by existing shareholders. Of the latter shares, 1,450,60 are being offered in Canada.

PURPOSE OF ISSUE

This issue represents the first public offering of the shares of the Company. A principal purpos of the offering is to establish a market for the Company's common shares. The net proceeds from the sale of the 5,600.000 new shares will be added to working capital. It is contemplated that these addition funds will be used to develop and expand the activities of the Company and its subsidiaries, primarily i the banking and insurance areas. .

CONDITIONS OF CANADIAN OFFERING

At the request of the Company, the following conditions apply on the allotment and sale of shares at the initial offering price:

- 1. No one person, firm or corporation to be allotted in excess of 500 shares;
- 2. No shares to be allotted to any I.O.S. employee or to members of his immediate family;
- 3. Offering or sale may not be made to any citizen of the United States, wherever resident:
- 4. No shares in the Canadian offering may be offered or sold outside Canada.

An application has been made to list the common shares (of the par value of 25¢ (United States Currency) each) of the Company on the Toronto Stock Exchange. Acceptance of listing will be subject to filing of required documents and evidence of satisfactory distribution, both within 90 days.

COMPANY FINANCIAL DATA

The financial statements of the Company are published in terms of U.S. dollars. For the purpos of the prospectus and this memorandum, as a matter of arithmetical computation only, the statements have been translated into Canadian dollars on the basis of \$1.00 U.S. - \$1.08125 Canadian.

I.O.S., LTD. AND ITS SUBSIDIARIES (THE IOS GROUP)

The Company and its over 80 operating subsidiaries are collectively known as The IOS Group.

The IOS Group is an international organization that offers a wide range of financial servics. Its principal activities include mutual fund sales and management; investment and commercial banking; development, sale and management of real estate investments; life issurance. Operations are c in over 100 countries, through 180 regional offices, with an executive and administrative staff of and an international calos force of over 13,000, which corve 760,000 clients.

. The growth of consolidated act income and the relative contributions made by the IOS Group's principal activities have been:

ucti	VICIOS HAVO OCCIII	Y	onr End	led Deed	mber 3	1	Six Mo	
	/ • •	1964	1965	1966	1967	1968	1968	1969
Ne	t Income (millions)	\$1.8	\$3.7	\$5.6	\$7.9	\$15.5	\$5.9	\$10.3
1.	Management and			~~~	-00		. 400	. 970
	Sale of Mutual Funds	97%	94%	80%	53%	57%	47%	37%
2.	Banking	-	2	17	23	24	25 .	40
3.	Real Estate	-	-	(4)	19	v 12	16	8
	Insurance	3 100%	100%	7 100%	100%	100%	100%	100%

The following is a brief summary of present operations.

1. Mutual Funds

Since 1960, the Company has sponsored ten mutual funds, an equity-linked term insurance program, and a closed-end investment company. It derives revenues both from commissions on the sale of fund shares and from fees collected for fund management services. In general, the Company has voting or management control of the investment media it has sponsored, and accordingly has the power to ensure the continuation of the contractual arrangements upon which its revenues depend.

A. Sales Sales activities are conducted through several subsidiaries and are now largely confined to the distribution of Company-sponsored fund shares and financial services. The following table shows the face amount of fund shares and insurance sold, net commission income after deduction of salesmen's commissions, and the number of sales personnel:

Sales (Face Amou millions		Net Commission Income (millions)	At End of Period	
1964	. \$ 317.8	\$ 4.8	2,200	
1965	659.6	9.4	4, 300	
1966	1, 152, 4	14.0	6,400	
1967	1,228.2	15.7	7 ,00	
1968	1,760.6	24.7	9,100	
1969 (6 months)	1,399.5	18.7	13,000	

In 1968, 64% of sales were in Europe, 9% in Latin America and the Caribbean, 7% in Africa, 6% in Canada, 6% in the Far East, 8% in other areas.

B. Management. Management services to the Company-sponsored mutual funds and the closed-end investment company are provided through eleven subsidiaries, seven of which are directly owned by Investors Overseas Services Management Limited, ("ISM"), a subsidiary in which the public holds a minority interest of approximately 20%. ISM has the right to purchase any company owned by the IOS Group which manages a mutual fund whose net assets are valued at \$50 million or more, so that it is entitled to acquire the four wholly-owned fund management subsidiaries when the asset value of each fund reaches that amount.

Growth of aggregate fund assets is shown below:

				der Mana d of Perio	
			(n	nillions)	
1964			\$	129.4	
1965	•			366.5	
1966				565.2	
1967	•			938.9	
1968			1	629,5	
1969	(8 months)	10.	i	969.8	

2. Banking

Banking activities are conducted through a wholly-owned subsidiary, which acts as a holding company. Its subsidiaries consist of five banks located in Switzerland, Germany, Italy, and the Banamas, which offer commercial banking services; two banks located in Luxembourg and the

At June 30, 1969, deposite totalled \$110.6 million. Revenues and product have developed as followns :

				Six Men	the Ended
	Year E	nded Dece	mber 31	Jun	n 30
	1966	1967	1968	1968	1969
			(mil	lions)	
Gross Incomo	\$3.0	\$5.3	\$9.1	\$3.4	\$11.0
Net Income	0.9	1.8	3.7	1.5	4.8

3. Real Estate

A wholly-owned subsidiary of the Company develops and sells real estate projects, primarily condominium apartments, houses and parcels of land, which are marketed principally as investments to absentee owners. Large projects are underway in Florida and in Spain. A Company-sponsored closed-end investment company recently raised \$108 million which, in part, will be invested in a joint he venture with a major U.S. hotel chain. Other subsidiaries provide real estate management, engineering and construction services. Profits from real estate activities have been:

Year Ended De cember 31			6 Months Er	6 Months Ended June 30		
1967	1968		1968	1969		
\$1.5	\$1.9	(millions)	\$0.9	\$0.8		

4. Insurance

Life insurance and reinsurance activities are conducted through subsidiaries of 78%-owned IOS Insurance Holdings Ltd. The four operating companies write program completion life insurance with respect to capital accumulation programs for the acquisition of mutual fund shares sold by Group companies, equity-linked term life insurance, reinsurance, and conventional life policies. The following table shows the combined insurance in force of the two largest operating subsidiaries and the Company's equity in the total earnings of the insurance subsidiaries:

		Insurance in Force At End of Period	Equity in Net Income of Insurance Subsidiaries During Period
		(mi	llions)
1964		\$ 135.6	\$0.06
1965		275.1	0.15
- 1966		475.1	0.38
1967		601.4	0.41
1968		930.3	1.08
1969	(6 months)	1,116.1	0.90

5. Other Activities

These include publication of a weekly newspaper, the publication and sale of an investment advisory service, and the development and operation of a wide variety of computer programs. In addition, a corporation has been established to engage in business related to the communications field.

FUTURE PLANS

Expansion plans call for the development of mutual funds designed for individual countries, and for funds or investment companies investing in specific industries. A new program has been initiated to provide investment management services to institutional and other large portfolios. Banking and insurance activities are being expanded through the acquisition of established businesses. In the plannin stage are also real estate projects in a number of countries, the largest of which are in the U.S. and in Gormany.

CAPITALIZATION

For a detailed description of the share capital, refer to page 27 of the prospectus.

· Authorized share capital consists of 75,000,000 proferred and 150,000,000 common shares, all with the par value of 25¢ U.S. each. After the sale of the 5,600,000 new common shares forming part of the total offering of 19,992,000 common marcs, there will be outstanding:

> 43, 674, 000 preferred shares common nharos 10, 992,000

accommodate the Company's stock option plan (described below), and are, in fact, a separate class 5. common shares that are not marketable. Both classes rank equally with regard to dividend rights and distribution of assets and thus have to be treated as identical for the purpose of calculating share earnings. However, to ensure management continuity, the holders of the preferred shares, voting separately and as a class, are entitled to elect 2/3 of the directors of the Company; the holde of the common shares are entitled to elect the remaining directors.

The Company may from time to time permit a registered holder of preferred shares to convert; specified number of preferre shares into common shares on the basis of one common for one prefer However, it may not authorize more than 20% of the preferred shares outstanding on January 1 in any year to be converted in such year.

A holder of preferred shares acquired under the Company's stock option plan is not permitted to convert them into common shares until he has completed 10 years' service with the Company (or 5 years if he has reached age 55), and then only to the extent of 10% per annum of the shares held by hi on such completion. If he is over 60, he may convert annually 20% of the shares held by him on his 60th birthday. Holders of preferred shares not subject to the restrictions of the plan have accepted to same conversion privileges as those possessed by employees with 10 years' service.

THE IOS STOCK OPTION PLAN

The Company's stock option plan, administered by The IOS Stock Option Plan Limited, was established in 1960 to encourage officers, directors, employees, and sales personnel to participate it the growth of the IOS Group. As a result, over 80% of the Company's shares came to be held by Group associates and employees.

Purchases of preferred shares under the plan are made at a price set quarterly, which is calcula according to a formula based on adjusted net worth of the Company. The number of shares allotted to sales personnel is geared to their sales volume. A holder of preferred shares under the plan has limited conversion rights as described in the foregoing section. Also, he may not transfer his shares to a third party before giving The IOS Stock Option Plan Limited an opportunity to purchase such share at the current formula price. It should be noted that, from 1965 through 1968, the number of repurch ased shares has been approximately equal to the number of shares issued under the option plan.

DIVIDEND POLICY

It is expected that no cash dividends will be paid during the next several years, but that stock dividends will be declared at least annually. In the opinion of the Company's counsel such stock dividends will not be taxable to Canadian shareholders.

TAX STATUS OF THE COMPANY

The Company's subsidiaries pay taxes to the jurisdictions in which they were incorporated or in which they operate to the extent that they are subject to taxation in such jurisdictions. The Group's corporate structure reflects a policy of maximizing profitability by taking advantage of favourable fiscal environments.

EARNINGS

Not income rose from \$1.8 million or \$0.04 per share in 1964 to \$15.5 million or \$0.34 per share in 1968. Results for the six months ended on June 30, 1969, were \$10.3 million or \$0.22 per share, compared with \$5.9 million or \$0.13 per share for the comparable period in 1968. We estimate not income for the year 1969 will be between \$28 - \$33 million, or \$0.53 - \$0.63 per share calculated on 54.6 million shares outstanding.

11.	1964	1965	1966	1967	1968	1069 (Est.)
Not Income (millions) - Per Share	\$1.8	\$3.7				\$28 - \$33

244 A Stipulation of Settlement

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Makia Ba Dubagu

HOWARD BERSCH,

Plaintiff,

-against-

DREXEL FIRESTONE, INC., DREXEL
HARRIMAN RIPLEY, BANQUE ROTHSCHILD,
HILL SAMUEL & CO., LIMITED,
GUINNESS MAHON & CO., LIMITED,
PIERSON, HELDRING & PIERSON,
SMITH, BARNEY & CO. INCORPORATED,
J. H. CRANG & CO., INVESTORS
OVERSEAS BANK LIMITED, ARTHUR
ANDERSEN & CO., I.O.S., LTD.,

and BERNARD CORNFELD,

Defendants.

71 Civ. 5373 (RLC)

STIPULATION OF SETTLEMENT

WHEREAS by order dated June 28, 1972 the Court determined that this action may be maintained as a class suit under the Federal Rules of Civil Procedure on behalf of a class consisting of all purchasers in the public offering or offerings commencing in September, 1969 of 11,000,000 shares of I.O.S., Ltd. common stock; and

WHEREAS on or about October 31, 1973 defendants

Banque Rothschild, Guinness Mahon & Co., Limited, Hill

Samuel & Co., Limited, Lexerd & Co., Inc. (formerly known

as Drexel Harriman Ripley and Drexel Firestone, Inc.),

Pierson, Heldring & Pierson and Smith, Barney & Co. Incorporated (the "Settling Defendants"*) moved to alter and

^{*} The term Settling Defendants as used in this Stipulation of Settlement includes all of the Settling Defendants' respective wholly and partially owned subsidiary correlations, successors, and all present and former stockholders, directors, officers, agents, employees, partners, personal representatives, heirs, executors, administrators and assigns.

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amend the order dated June 28, 1972 to provide that this action may not be maintained as a class action, or, alternatively that foreign nationals who purchased outside the United States be excluded from the class, the defendants Banque Rothschild, Guinness Mahon & Co., Limited, Hill Samuel & Co., Limited and Pierson, Heldring & Pierson moved the Court to dismiss the complaint against them for lack of personal jurisdiction and the defendants Banque Rothschild and Smith, Barney & Co., Incorporated moved to dismiss this action for lack of subject matter jurisdiction; and

WHEREAS said motions by the Settling Defendants are pending and undetermined; and

WHEREAS substantial discovery has been conducted by the plaintiff Howard Bersch by the inspection of documents, oral depositions and otherwise, and plaintiff has completed discovery as to jurisdiction with respect to the claims against the Settling Defendants; and

whereas the parties hereto desire by settlement of all controversy between them to avoid the expense, inconvenience, distraction and delay of further litigation; and

WHEREAS the Settling Defendants disclaim any liability and any wrongdoing of any kind whatsoever, have denied the allegations of the complaint and have asserted defenses which they believe are meritorious; and

whereas plaintiff Howard Bersch has taken into account the uncertainties involved in establishing jurisdiction and liability and demonstrating any damages against the Settling Defendants and deems the settlement proposed herein as fair, reasonable and adequate in his interest and in the interests of the class that he represents,

Now, therefore, to settle this action, to put to rest all controversy, to avoid the expense, inconvenience, distraction and delay of further litigation between the plaintiff Howard Bersch on behalf of himself and each member of the class and the Settling Defendants, and to assure appropriate benefits to the class, IT IS STIPULATED AND AGREED as follows by and between plaintiff Howard Bersch for himself and each member of the class ar' the Settling Defendants: 1. Upon the effective date of this settlement, the Settling Defendants shall forthwith pay to Chemical Bank New York Trust Company, as custodian, for distribution as hereinafter provided, the sum of Seven Hundred Thousand Dollars (\$700,000.00) 'the "Settlement Fund"). 2. Upon the payment by the Settling Defendants of the Settlement Fund as above provided, and after deduction from the Settlement Fund of such amounts as may be determined by the Court for the payment of attorneys' fees, disbursements and expenses of litigation on behalf of the class, and the expenses of administering and distributing the Settlement Fund, such custodian shall deposit the Settlement Fund in an interest-bearing account until the time of distribution. At that time, the custodian shall transfer the Settlement Fund to a checking account. Funds in the checking account shall be disbursed to members of the class in proportion to their proved losses in such manner and at such time or times as the Court may direct. 3. Promptly after the execution of this Stipulation of Settlement, application shall be made to the Court for an order scheduling a hearing on approval of this Stipulation of Settlement and the allowance of attorneys' fees,

and bering and enjoining the assertion against them of, any claims, demands or causes of action which plaintiff and the plaintiff class have or may have to the extent of (and solely to the extent of) any claims, demands and causes of action, by way of indemnity, contribution or otherwise, adjudicated against the Settling Defendants in favor of the non-settling defendants and arising out of or relating to any of the events, matters or transactions alleged in the complaint; and

(4) Providing that in the event plaintiff or any member of the plaintiff class recovers in this action, after trial, settlement or otherwise, against the nonsettling defendants or any of them, the Settling Defendants will be indemnified and held harmless, as a first charge upon any amount so recovered, against any and all liabilities or expenses, including reasonable counsel fees and the necessary and proper expenses of litigation incurred by them, by reason of the assertion by the non-settling defendants against the Settling Defendants of any claim, whether by cross-claim, thirdparty claim or otherwise, arising out of or relating to the events, matters or transactions alleged in the complaint herein, provided that the Settling Defendants actively defend against the assertion of such claims and the Settling Defendants shall not settle or otherwise compromise such claims without the prior written approval of Sidney B. Silverman, and provided further that the Settling Defendants shall be indemnified and held harmless as a first charge upon such recovery for any expenses necessarily and fairly incurred by the Settling Defendants in connection with furnishing evidence in this

action by deposition, discovery, at trial or otherwise.

- B. The entry of tinal judgment dismissing with prejudice and on the merits so much of any other action brought in any court and pending at the time the final judgment described in (A) above is entered, which alleges against the Settling Defendants any claim, demand or cause of action arising out of or relating to any of the events, matters or transactions alleged in the complaint herein.
- c. The expiration of 10 days after the time in which to seek review of the final judgments referred to in paragraphs A and B hereof without any review having been sought or, if such review be sought, the expiration of 10 days after such review shall have been finally determined or disposed of in such manner as to permit the consummation of this settlement.
- 5. Upon approval by the Court of this Stipulation of Settlement, the Court may allow attorneys' fees and disbursements and expenses of litigation paid or incurred on behalf of the class, said fees, expenses and disbursements to be paid out of the Settlement Fund subsequent to the effective date of this settlement in such manner and at such time or times as the Court may direct.
- 6. At any time prior to five days before the first scheduled hearing on approval of this Stipulation of Settlement, the Settling Defendants may by writing addressed to counsel for the plaintiff withdraw from this settlement and terminate this Stipulation of Settlement, if members of the plaintiff class holding in the aggregate more than 300,000 shares of the common stock of I.O.S.,

Ltd. elect to be excluded from the plaintiff class.

consummated for any reason whatsoever (other than the willful failure of any party to this Stipulation to perform his or its obligations hereunder), this Stipulation shall have no further force or effect and this Stipulation and all negotiations, proceedings and statements made in connection therewith shall be without prejudice to any person, partnership or corporation, shall not be deemed or construed to be an admission by any party of any act, matter or proposition and shall not be used in any manner or for any purpose in any subsequent proceeding in this action in any court.

Dated: New York, New York June 23, 1974

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SULLIVAN & CROMWELL

Attorneys for Lexerd & Co., Inc.
(formerly known as Drexel
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Firestone, Inc.), Hill Samuel
& Co., Limited, Guinness Mahon
& Co., Limited and Pierson,
Heldring & Pierson

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Opinion of Carter, D.J. re Motions to Dismiss

CARTER, District Judge:

Posture of the Litigation

The instant action involves yet another chapter in the fitful recent history of I. O. S., Ltd., the once high-flying mutual fund management corporation. Plaintiff sues on behalf of all who purchased I. O. S. stock from participating underwriters in a September, 1969, tripartite offering, and alleges, in substance, that the prospectuses pursuant to which the offering was made were false and misleading in that they failed to reveal material facts concerning I. O. S.'s finances, illegal activities, chaotic bookkeeping, and mismanagement, and the actual looting and plundering of I. O. S.'s treasury, all in violation of Sections 12, 15 and 17 of the Securities Act of 1933 (15 U.S. C. §§77(1), 77(6), and 77(q)); Sections 10(b), 15(c)(1), and 20 of the Securities Exchange Act of 1³⁴ (15 U.S. C. §§78j(b), 780, and 78t), and SEC Rules 10b-5 and 15c1-2 (17 C. F. R. 240.10b-5, 240.15c1-2).

I. O. S. has been named a defendant, as has Bernard Cornfeld, who during the years with which this litigation is concerned was I. O. S.'s chief executive officer, board chairman, and largest shareholder. Other defendants include the eight principal underwriters and the international accounting firm which certified the financial statements that appeared in the prospectus.¹

^{1.} Six of the defendant underwriters headed one branch of the offering, and are at times hereafter collectively referred to as the "Drexel Group." They are Drexel Firestone, Inc. (formerly known as Drexel Harriman Ripley; since March 16, 1973, known as Lexerd & Co.; hereafter referred to as Drexel); Banque Rothschild (Rothschild); Hill Samuel & Co., Ltd. (Hill Samuel); Guinness Mahon & Co., Ltd. (Guinness Mahon); Pierson, Heldring & Pierson (Pierson Heldring); and Smith, Barney & Co., Inc. (Smith Barney), J. H. Crang & Co. (now known as J. H. Holdings, Ltd.; hereinafter referred to as Crang) was lead underwriter for a second branch of the offering, and Investors Overseas Bank, Ltd. (I. O. B.), headed up the third. The accounting firm is Arthur Indersen & Co. (Arthur Andersen).

In a memorandum opinion dated June 28, 1972, the court (Frankel, J.), ruled tentatively that this action might be maintained as a class action. In so doing, Judge Frankel expressly reserved for later determination by the Judge to whom the case was to be assigned for all purposes under the then-incipient individual assignment system, three issues: subject matter and personal jurisdiction; whether foreign purchasers should be included in the plaintiff class; whether and how the court's ultimate judgment may be made binding upon foreign class members. On December 27, 1972, the Drexel Group entered into a consent order (Ryan, J.) with the plaintiff, in which it was agreed that plaintiff would initially limit discovery to the issues left open by Judge Frankel, at the completion of which defendants would make jurisdictional and class determination motions within sixty days.

On April 2, 1973, Judge Ryan ordered that plaintiff's discovery be completed by September 1, 1973. On October 31 and November 1, 1973, defendants other than I. O. S. and Cornfeld filed motions designed to challenge the court's jurisdiction. On December 3, 1973, with the consent of the parties, Judge Ryan adjourned the motions to on or after

April 15, 1974. Further adjournments followed.

During the same general period, defendants I. O. S. and Cornfeld were drawn into the fray. On December 7, 1972, a certificate of mailing was filed, indicating that a summons and complaint had been mailed to I. O. S. at an address in London, England. On May 21, 1973, a marshal's return was filed, indicating that Bernard Cornfeld had been served on May 15, 1973 at an address in California. Neither I. O. S. nor Cornfeld appeared, and on September 20, 1973, a default judgment was signed by Judge Ryan and entered against them. On December 5, 1973, defendant Cornfeld moved by order to show cause to vacate the default, and on December 26, 1973, Judge Ryan signed a consent order vacating the default and default judgment, and directing I. O. S. and Cornfeld to serve whatever jurisdictional motions they felt appropriate within forty days, said motions

to be returnable at the same time as the aforementioned motions of the other defendants.

On February 1, 1974, a certificate of mailing was filed, indicating that a summons and complaint had been sent to I. O. S. offices in New Brunswick, Canada and Geneva, Switzerland, and to Cornfeld c/o St. Antoine Prison in Geneva, where he was then incarcerated. On February 21, Cornfeld filed a motion to dismiss the complaint and to amend Judge Frankel's class action determination, and on April 18, I. O. S. moved to dismiss the proceedings or, failing that, to stay them.

In mid-June, 1974, my chambers was informed that plaintiff and the Drexel Group were near agreement on a settlement, and that papers embodying the proposed settlement would be placed before the court by the end of June, at which time a conference would be requested. On June 28, 1974, a conference was indeed held. After a spirited exchange between the plaintiff and the "settling defendants" on the one hand and the "non-settling defendants" on the other, a second conference was set for July 15, at which time the relationship between the partial settlement and the pending motions was to be discussed. On the 15th, the parties were apprised of and apparently acquiesced in the court's proposal that it first determine whether subject matter jurisdiction was present, advise the parties orally of its decision so that a notice of settlement could be perfected and distributed, and thereafter the court would file a written opinion explaining its holding.

On July 29, the parties were notified by telephone that the court had concluded that it had subject matter jurisdiction and were given until July 31 to submit technical and procedural modifications to the proposed notice of settlement, and until August 2 to register responses to the suggested changes. On July 30, counsel for Crang requested another conference with the court and the parties. On July 31 that requested conference was held. The non-settling defendants urged the court to certify to the Court of Appeals, pursuant to 28 U. S. C. §1292, the subject matter

jurisdiction question. Further, they asked a stay of issuance of the notice of settlement until all appeals in respect of the jurisdictional questions had been exhausted. In addition, the non-settling defendants highlighted what they considered to be the most glaring defects in the proposed notice. I advised all present that inasmuch as similar facts and principles would be reviewed and applied in determining questions of subject matter and personal jurisdiction, I thought it appropriate to decide these issues together, and then assure appellate review of the package, either by directing the ertry of a final judgment under Rule 54(b), Fed. R. Civ. P., or by certifying the jurisdictional questions to the Court of Appeals. I made it clear, however, that determination of the fairness of the settlement and approval or disapproval of same need not and ought not await the outcome of such appeals. I thereupon directed the parties to resolve among themselves as many of the suggested modifications to the proposed settlement as they could, and to submit for my determination the remainder. Moreover, approval of the settlement proposal was deliberately delayed to make certain that the time lag between that event and the filing of this opinion on the issues of subject matter and in personam jurisdiction, would not be of long duration.

The Issues to Be Considered

Ripe for decision are defendants' motions to dismiss for lack of subject matter jurisdiction, for lack of personal jurisdiction, because of forum non conveniens, and (as to defendants I. O. S. and Cornfeld) because of defective service of process and because of plaintiff's failure to cosecute.

The Nature of the Offering

The 1969 I. O. S. public offering can be viewed as a single offering, two offerings, or three depending upon whether one focuses on the purposes of the offering and

the interaction of its prime movers, upon the character of the offerings themselves, or upon the structure of the selling arrangement and the identity and locus of the purchasers. The Drexel Group served as chief underwriters for a primary offering of 5,600,000 new shares sold in Europe to Europeans. I. O. B., a wholly-owned subsidiary of I. O. S., managed a secondary offering in which 490 I. O. S. shareholders, most of them American, sold 3,950,000 shares to I. O. S. employees, long-time clients, and persons with long-standing business relationships with I. O. S., approximately 386 of whom were Americans. Crang managed a secondary offering of 1,450,000 shares, 150,000 of which it received from I. O. B. None of these shares were sold to Americans.

Based upon the evidence before me at the present time, I am convinced that the three offerings were sufficiently integrated and intertwined so as to appropriately be considered a unified transaction for purposes of subject matter jurisdiction considerations. Although the defendants appear to have gone to great pains to refer publicly to the offerings as separate and distinct—and in fact each offering had unique characteristics and some non-identical parties nonetheless they were closely tied components of a functionally integrated process. Each of the offerings was of common shares of I. O. S. Deposition testimony of key figures involved in the offerings, a memoranda circulated among the various defendants, and the three final prospectuses all confirm that the Drexel Group, I. O. B., and Crang branches of the offering were commenced simultaneously and at the same price of \$10 (U.S.) per share. The closings of all of the offerings occurred simultaneously as well. Although three different prospectuses were utilized, those of the Drexel Group and I. O. B. were substantially identical. The Crang prospectus, while "different" from the other two insofar as it sought compliance with Canadian securities regulations, utilized the same certified financial statement prepared by Arthur Andersen & Co., as did the other two prospectuses.

The "Plan of Distribution," at page 29 of the Crang prospectus, describes a patent connection between the I. O. B. and Crang offerings. I. O. B., acting as agent for selling shareholders, most of whom were American, was to offer 4,100,000 shares of I. O. S. common. Of that amount, it agreed to sell 150,000 shares to Crang, which Crang would sell for the American shareholders along with the other shares it was offering. In effect, Crang had assumed the obligations of and rights to a portion of the I. O. B. offering.

Contemporaneous documents also reflect that the underwriters considered the offerings to be closely intertwined, if not unitary. Murray J. Howe, of Crang, described the proposed Canadian offering in an interoffice memo dated August 29, 1969, stating:

"The offering of common shares of I. O. S., Ltd. to the public will total approximately \$120,000,000 which will represent 20% of the total number of shares outstanding of the company. This new issue will be offered in Canada, the United Kingdom, Europe and other countries. The portion that will be offered in Canada (all Provinces) for Canadian distribution only, will approximate \$15,000,000. ... The Canadian, United Kingdom and European offerings will all be coordinated to be offered on or about September 24th. The issue price which will not be set until 3 or 4 days before the official offering date, will be between \$10 and \$11 per share which, incidentally, works out to be approximately 15 times current earnings." (See Appendix II, accompanying plaintiff's memorandum (hereinafter "Appendix II") Document 71.) (Emphasis added)

In a letter from Howe of Crang to Edward Cowett of I. O. S., discussing the upcoming offering and Crang's role as managing underwriter for Canada, reference was made to the need for someone to coordinate the various underwritings and for one underwriting agreement between

I. O. S. and the managing underwriters of each offering. (See Appendix II—Document 73).

As the offering took shape, the managing underwriters appear to have been acutely aware of their ties to each other's segment of the transaction. Grayson Murphy of Shearman & Sterling, the firm representing Drexel Harriman, in a letter to the SEC, dated May 14, 1969, requested a meeting with the Commission regarding the offering, seemingly, treating it as a unitary one. (Appendix II— Document 75). At the meeting, as described by a member of Drexel Harriman, Murphy explained the principal features of all three of the offerings. (Appendix II—Document 15a). In a letter to the SEC dated August 7, 1969, Murphy referred to the three offerings as separate, yet recognized the connections between the offerings in his attempt to obtain a favorable SEC opinion on registration of the shares. He was necessarily aware of the terms of the two other offerings and their effect upon his branch of the transaction. Moreover, in a reply letter to Murphy of September 8, 1969, the SEC saw fit to communicate information regarding "that part of the offering managed by Investors Overseas Bank."

The so-called "pertinent facts" stressed in Crang's reply memorandum in support of the motion to dismiss are inconclusive. The fact that the managing underwriters did not share in each other's fees might go to their particular roles and responsibilities in the offering, but has little bearing on the integrated nature of the transaction. Additionally, the alleged lack of activity by Crang in the United States and its failure to sell to United States citizens are potentially relevant to the issue of personal jurisdiction, but do little to elucidate the overall character of the offering and the relationship of its three branches.

While plaintiff is necessarily speculating, there appears to be substantial logic in his assertion that the primary and secondary features of the offering were necessary concomitants. The latter, which is an opportunity for management to realize on their investment, provides the incentive for the primary offering. The primary offering managed by Drexel creates the market for management to realize its profit in the secondary offering managed by Crang and I. O. S. While this relatedness of purpose is difficult to document, sufficient ties have been demonstrated to support plaintiff's contention that the three offerings were so integrated as to have their prime movers collectively considered for purposes of subject matter jurisdiction.²

I

Defendants have moved, pursuant to Rule 12(b) (1), F. R. Civ. P., to dismiss for lack of subject matter jurisdiction.

The court's jurisdiction emanates primarily from §27 of the Securities Exchange Act of 1934, 15 U. S. C. §78aa.³ To the extent that some of plaintiff's claims arise under the Securities Act of 1933, its jurisdictional provision—

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or whereever the defendant may be found. ***

^{2.} Supportive of the integrated offering thesis which allows for collective consideration of the defendants, is the aider and abettor concept. Borrowed from the criminal law and the law of torts, it has been applied in private actions under the American securities laws. See, e.g., SEC v. National Bankers Life Insurance Co., 324 F. Supp. 189 (N.D. Tex 1971); Pettit v. American Stock Exchange, 217 F. Supp. 21 (S. D. N. Y. 1963).

^{3.} That provision reads, in pertinent part:

[&]quot;Jurisdiction of offenses and suits.

Section 22, 15 U. S. C. §77v—should be viewed as being coextensive in reach with that of the 1934 Act. This conclusion is dictated by the language of each statute as well as by the statutes' shared function in policing securities transactions that are effected within the United States or that have a significant domestic impact. Cf. Leasco Data Processing Corp. v. Maxwell, 468 F. 2d 1326, 1335-36 (2d Cir. 1972); SEC v. United Financial Group, Inc., 474 F. 2d 354, 356 (9th Cir. 1973). At issue is whether the reach of those provisions extends to a securities transaction with substantial foreign components.

It is clear that the provisions of the American securities laws may cover transactions in the securities of foreign issuers. See, Leasco Data Processing Corp. v. Maxwell, supra; Madonick v. Denison Mines Ltd., CCH Sec. L. Rep. ¶94,550 (S. D. N. Y. 1974); United States v. Clark, 359 F. Supp. 131 (S. D. N. Y. 1973). Ultimately, the concern is that domestic law be applied only to transactions with which the United States has a significant connection or interest. In assessing a particular transaction's connection with the United States, two basic principles are applied, concurrently or alternatively.

The first approach, sometimes referred to as the "subjective territorial principle," extends jurisdiction over acts or omissions which occur within a state's boundaries, even though the effect of such acts or omissions may be felt without. This Circuit, in its most recent pronouncement on application of the securities laws to foreign securities, relied upon this principle as set forth in §17 of the Restatement (Second) of Foreign Relations Law of the United States (1965). Leasco Data Processing Corp. v. Maxwell, supra.

^{4. &}quot;§17. Jurisdiction to Prescribe with Respect to Conduct, Thing, Status, or Other Interest within Territory

A state has jurisdiction to prescribe a rule of law

⁽a) attaching legal consequences t conduct that occurs within its territory, whether or not su consequences are determined by the effects of the conduct outside the territory, and

⁽b) relating to a thing located, or a status or other interest localized, in its territory."

In Leasco, an American company sought damages resulting from the fraudulent sale of a British company, the stock of which was listed on the London Stock Exchange, but not on any American exchange. The actual purchase of the securities occurred in England. The court focused on misrepresentations and meetings which occurred in the United States, although it acknowledged that the crucial misrepresentations may have occurred in England. It stated, at 468 F. 2d 1334, that:

"Conduct within the territory alone would seem sufficient from the standpoint of *jurisdiction*, to prescribe a rule. It follows that when, as here, there has been significant conduct within the territory, a statute cannot properly be held inapplicable simply on the ground that, absent the clearest language, Congress will not be assumed to have meant to go beyond the limits recognized by foreign relations laws."

The second approach, which has been labeled the "objective territorial principle," was implicitly applied in *Schoenbaum v. Firstbrook*, 405 F. 2d 215 (2d Cir. 1968). The principle, as set forth and illustrated in §18 of the Restatement (Second) of Foreign Relations Law of the United States (1965), 5 extends jurisdiction to conduct which

5. "§18. Jurisdiction to Prescribe with Respect to Effect within Territory

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

- (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
- (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies;
 - (ii) the effect within the territory is substantial;
- (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and
- (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."

occurs outside a territory, but which has an impact within the territory.6

In Schoenbaum, American shareholders brought an action against a Canadian company which did no business in the United States for fraudulent acts committed outside the United States with respect to the securities of that foreign company. The court found jurisdiction because the securities were registered on an American exchange and the transactions in question were seen as being detrimental to the interests of American investors. It cited two examples of transactions possessing foreign elements but having a domestic impact.⁷

"We believe that Congress intended the Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities."

Schoenbaum v. Firstbrook, supra, at 206.

^{6.} An early application of this principle by this Circuit occurred in the well-known antitrust case of *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945), where it was held at 443, that:

[&]quot;* * * it is settled law * * * that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize * * *"

^{7.} These two examples do not comprise an exhaustive list of transactions to which the objective territorial principle applies. See, Travis v. Anthes Imperial Ltd., 473 F. 2d 515, 523, n.14 (8th Cir. 1973):

[&]quot;We are not persuaded that the Second Circuit intended, in Schoenbaum, to set forth the exclusive circumstances in which extraterritorial application of the Act is proper * * *. The court was not required to decide whether the Act would apply to a foreign transaction in foreign securities which had more been registered or listed on an American exchange when amber of significant elements of the fraudulent scheme took place in the United States.

[&]quot;Moreover, Schoenbaum was not a limiting decision as the Court decided that subject matter jurisdiction was present."

II

Application of the principles espoused in *Leasco* and *Schoenbaum* satisfies the court, as more fully explained below, that subject matter jurisdiction exists.⁸

The record indicates that conduct took place in the United States continually throughout the entire period during which the offering was conceived, assembled and effected. The offering was discussed and at least partially initiated and organized here during numerous meetings between the major underwriters, their American attorneys, I. O. S. officials and accountants. In March and April of 1969, an I. O. S. official met with a representative of Guinness Mahon Representation Co. of N. Y. (which was affiliated with Guinness Mahon & Co. Ltd. of London), and an officer of Drex l at Drexel's New York offices on two occa-

The American nationality and character of defendants was stressed in SEC v. United Financial Group, Inc., supra.

This theory of jurisdiction is relevant insofar as Drexel Harriman and Smith, Barney, the two leading underwriters of the primary offering, were American firms. In addition, Price Waterhouse was retained by Drexel Harriman as a consultant and to aid in the due diligence report. Finally, several New York law firms were involved in the preparation of the prospectus and the offering. Although I. O. S. was a foreign-based corporation, its president, Bernard Cornfeld, its chief operating officers, and many of its employees were Americans.

^{8.} Plaintiff has relied upon a third theory of jurisdiction which this court need not explore in depth. Termed the "nationality principle," it carries less weight than the two approaches already described, and provides a territory with jurisdiction over the conduct, wherever effectuated, of its nationals. It provides, as embodied in §30 of the Restatement (Second), United States Foreign Relations Law, that:

[&]quot;§30. Jurisdiction to Prescribe with Respect to Nationals

⁽¹⁾ A state has jurisdiction to prescribe a rule of law

⁽a) attaching legal consequences to conduct of a national of the state wherever the conduct occurs or

⁽b) as to the status of a national or as to an interest of a national, wherever the thing or other subject-matter to which the interest relates is located."

sions, during which the proposed offering was discussed.

(See Appendix II-Documents 1 and 2).

After Drexel retained the New York law firm of Shearman & Sterling to represent it in the offering, members of that firm engaged in numerous meetings and interactions in and from the United States while shaping Drexel's participation and putting the offering together. Murphy, of Shearman & Sterling, met with Edward Cowett, an executive officer of I. O. S., and two representatives of Drexel in New York in order to discuss, inter alia, the listing of the shares, locations of the offering, and tax problems of I. O. S. officials. Murphy engaged in several telephone conversations from New York with Cowett in Geneva. (See Appendix II—Document 6). Drexel officials and its counsel met with SEC officials to discuss the offering and problems the SEC had with I. O. S. (See Appendix II—Document 8). Other communication with the SEC followed and Murphy was put on warning as to potential application of a 1967 SEC prohibitory order to I. O. B. sales to Americans. (Appendix II—Document 44).

Drexel retained the services of Price Waterhouse in New York to act as a financial consultant in the offering and to help investigate I. O. S. These efforts were part of the due diligence report. (Appendix II—Documents 11 and 13). Numerous planning and exploratory communications took place in New York, involving the underwriters, attorneys and Price Waterhouse. (Appendix II—Documents 15—20, 23). A review of some of the Arthur Andersen work papers involved in its earlier financial report on I. O. S. was made by Price Waterhouse officials in New York. While the bulk of those papers related to mutual funds owned by I. O. S., the information was relevant to preparation of

the prospectus. (Appendix II-Document 20).

Negotiations and meetings between the principal parties continued through July and August of 1969 in New York and elsewhere. Although much of the work performed at that time was preliminary research undertaken by Drexel prior to firmly committing itself, substantial elements of the offering were structured as a result of this activity. (See generally Appendix II—Documents 22—42). For example, at a meeting in which Cowett of I. O. S. and Coleman of Drexel expressed their intention to enter a firm agreement, terms of the offering were discussed—mainly prices and accounting procedures. Preliminary discussions on underwriting discounts and commissions possibly took place in New York. (Appendix II—Document 26). Financial information on I. O. S. and the various mutual funds it advised was sent to Price Waterhouse in New York and was kept on file there. (Appendix II—Document 28).

At a meeting in New York on July 11, 1969, members of Price Waterhouse, Arthur Andersen, Shearman & Sterling, I. O. S., and Drexel discussed the need for an audit or partial audit in connection with the offering planned for September. A timetable for the audit and the need for an early offering were discussed. Additionally, Arthur Andersen's work in connection with June 30, 1969 financials of I. O. S. was mentioned. (Appendix II—Documents 30, 32). Counsel for Drexel met with I. O. S. counsel in New York and discussed a draft of the opinion letter to be issued in connection with the offering. (Appendix II—Document 33).

After returning from work in Europe, Price Waterhouse officials met with members of Shearman & Sterling and Drexel in New York. They discussed a preliminary draft of a report by Price Waterhouse to Drexel that included questions about practices engaged in by I. O. S., and Arthur Andersen's financial report on the company. Work on that report was performed in Europe and New York. Price Waterhouse also reviewed property in Florida held by one of the funds managed by a subsidiary of I.O.S. (Appendix II—Documents 45 and 47).

On September 23, 1969, the day before the offering was to commence, an SEC investigation of a subsidiary of I. O. S. was reported in the press. Coleman of Drexel, Murphy of Shearman & Sterling, and Stammer of the law firm of Haft & Stammer met in New York and drafted a

sticker to be attached to the prospectus regarding the SEC investigation. Calls were made to I. O. S. officials in Geneva and a joint decision was made on the addition to the prospectus. (Appendix II—Document 50). Letters were sent by Murphy in New York to various participants in the offering, distributing a proof of the Closing Memoranudm.

(Appendix II—Document 52).

Drexel established bank accounts with the Bank of New York for the I. O. S. offering, and instructed those purchasing I. O. S. shares that payment was to be made in United States dollars to the Bank of New York on Broad Street, for the account of Drexel with the Bank of New York in London. (Appendix II—Documents 56—58). Meetings were held in New York and reports submitted on the progress of the offering. (Appendix II—Documents 63 and 64). A memorandum describing the procedure for the offering was prepared and distributed in New York. (Appendix II—Document 70).

During this period other underwriters had been contacted and were involved in the offering plan. In April of 1969, while in New York, Murray J. Howe, president of Crang, met with Cowett of I. O. S. While there is no indication that the meeting was pre-planned, the I. O. S. offering was discussed and Crang made an effort to secure the entire Canadian underwriting. (Appendix II—Documents 4 and 27). Howe's letter dated May 13, 1969, makes clear that details of the offering were discussed at the New York meeting. As demonstrated by the opening line of that letter -"When we last met in New York to discuss the forthcoming issue of I. O. S. Ltd. (S. A.) ... "-the I. O. S. offering was not a peripheral topic of conversation, and was at least a primary reason for the meeting. (Appendix II— Document 73). A second meeting in New York occurred in July, 1969, at which the I.O.S. prospectus and offering were discussed. (Appendix III- Document 27).

Executives of Smith Barney, another leading underwriter, raet in New York, discussed the offering and decided to participate. (Appendix II—Document 12). They engaged in talks with Drexel in New York regarding the offering, and structured their own involvement in the offering. (Appendix II—Documents 36, 37, 39, 40, 42). Smith Barney determined that all of its I O. S. share allocations would be made through its New York office (Appendix II—Document 49), and that payment for the shares was to be made to a bank in New York, payable to a sub-account in London. (Appendix II—Document 51).

In August and September of 1969, other prospective American underwriting firms were solicited. Those firms which did not have European offices were shown a draft of the prospectus which was brought from Europe and taken around by hand in New York. (Appendix II—Document

43).

Obviously, many of the documented occurrences, taken by themselves, are of minimal significance. Nonetheless, these circumstances viewed in toto disclose conduct constituting an essential link in the offering in the United States. While formal or ultimate acts were staged in Europe—e.g., the drafting of the final prospectus and signing of agreements—discussions, investigations, decision-making and planning were carried on, to a significant extent in the United States by Americans and others, and the acts abroad were substantially supervised from New York. Instrumentalities of interstate commerce were commonly used. Much of the effort that went into the due diligence report and preparation of the material basic to all the prospectuses also appears to have been expended in the United States.

III

Defendants place great emphasis upon the fact that fraudulent misrepresentations were not made or relied upon in the United States, thus distinguishing the transaction in question from the rule of *Leasco*, as they understand it. Their understanding is somewhat myopic insofar as

they treat synonymously the limited fact pattern in *Leasco* with the broader and more flexible legal principles which the court applied.

The crux of the jurisdictional basis in Leasco was the finding of "significant conduct within the territory." Leasco Data Processing Corp. v. Maxwell, supra, at 1334. See also, Travis v. Anthes Imperial, Ltd., 473 F. 2d 515, 524 (8th Cir. 1973); SEC v. United Financial Group, Inc., supra. To be sure, in the instant case the ultimate representations or inducements do not appear to have occurred in the United States, as was true in Leasco; nevertheless, as just enumerated, other significant conduct clearly did occur here which influenced and shaped the entire underwriting and offering, including the extent and quality of disclosure. It would seem consistent with the Leasco approach to consider that conduct as jurisdictionally significant. As in *Leasco*, the mails and other instruments of interstate commerce were a necessary part of the domestic activity. Finally, the domestic conduct was, although less direct than that in Leasco, an "essential link" in inducing the ultimate purchases.

A second element integral to the finding of jurisdiction here is the impact which the transaction in question had upon American investors and the American securities market. The defendants acknowledge that the Leasco court considered significant the fact that an American company was defrauded. Fraudulent sale to Americans was also given weight by this court in United States v. Clark, 359 F. Supp. 131 (S. D. N. Y. 1973), and by the Ninth Circuit in SEC v. United Financial Group, Inc., supra. It is recognized that the defendants appear to have made an attempt to prevent any sales to Americans. Moreover, no sales to Americans did occur through the Drexel Group or Crang offerings. Nevertheless as previously discussed, the three offerings should be considered a single transaction for purposes of subject matter jurisdiction. Sales through the I. O. P. offsking have been documented to approximately 386 Americans, che among them being plaintiff Bersch. While this might ultimately prove to be a small number of the class sought to be represented, the number is not determinative.

Plaintiff suggests another impact on the American securities market resulting from the offering. Plaintiff contends that I. O. S. was so deeply intertwined with the American securities market that its activities were an appropriate concern of the SEC and the courts under the mandate of our securities laws. I. O. S.' principal business activity at the time of the offering was the sale and management of mutual funds. Those funds conducted a massive amount of trading in American securities, giving them a significant potential to create severe market instability. As documented by Professor Morris Mendelson in a study of I. O. S., the findings of which are outlined in an affidavit submitted to the court, the failure of the I. O. S. offering had the effect of impairing foreign investor confidence in the American market and inhibiting sales of domestic securities abroad with a subsequent decrease in the flow of foreign capital; moreover, the mutual funds sold large amounts of American securities resulting in a depression in the prices of American securities. While proof of a clear correlation between the failure of the I. O. S. offering and the above-mentioned results is difficult to document, some credence must be given to the general proposition that a collapse of a public offering by a company whose subsidiaries trade and hold massive amounts of American securities would have a negative impact on the American market.

^{9.} In SEC v. United Financial Group, Inc., supra, only three American investors were ascertained. The court perceived a sufficient impact on American investors, holding at 356, 357:

[&]quot;In this case, focus should be upon appellants' activities within the United States and the impact of those activities upon American investors. Here, there was a showing of very substantial activities by appellants within the United States and a showing that, as a result of those activities, at least three American investors now hold nearly \$10,000 worth of stock for which there appears to be no market * * *."

The Section 30(b) Exemption

Several of the defendants—Crang and Smith Barney—assert that they are exempt from the coverage of the Securities Exchange Act by reason of Section 30(b) of that Act, 15 U. S. C. §78dd(b). That section provides:

"The provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter." (Emphasis added)

The above-named defendants contend, in essence, that they transact a business in securities abroad.

In invoking §30(b), defendants have interpreted that provision literally, contrary to the prevailing view in this Circuit. Initially, it should be noted that in Schoenbaum v. Firstbrook, supra, it was held that §30(b) does not exempt those who engage in isolated foreign transactions. More significantly, the court explicitly held that "jurisdiction" as employed in §30(b) is not defined as "territorial limits." Accord, SEC v. United Financial Group, Inc., supra. If essential elements of the transaction in question occurred here, and/or there was a significant impact on the domestic market, then the transaction is deemed to have occurred within the jurisdiction of the United States and §30(b) does not apply. See, e.g., Roth v. Fund of Funds, Ltd., 405 F. 2d 421 (2d Cir. 1968), cert. denied, 394 U. S. 975 (1969), rehearing denied, 395 U.S. 975 (1963); In the Matter of I. O. S., Ltd. (S. A.), CCH FED. SEC. REP. ¶78,637 (March 14, 1972).

Nor does Kook v. Crang, 182 F. Supp. 388 (S. D. N. Y. 1960), buttress defendants' argument. As the SEC noted

in its ruling in In the Matter of I. O. S., Ltd. (S. A.), supra, at 81,361:

"Kook v. Crang, . . . makes clear that a Section 30(b) exemption depends upon a showing that all the essentials of the transactions in question occurred outside of the United States."

Here, concededly, certain essentials of the transaction did occur within the United States. That transaction involved the three intertwined offerings and therefore Crang and Smith Barney are all implicated in the jurisdictionally significant conduct which occurred domestically. Thus, each can be said to have transacted a business in securities within the jurisdiction of the United States, removing them from the protection of §30(b).

In Personam Jurisdiction

Two of the defendants—Crang and I. O. S.—¹⁰ move for dismissal pursuant to Rule 12(b)(2), Fed. R. Civ. P., contending that this court lacks in personam jurisdiction as regards them. Their argument, as individually applied, is that they neither "do business" in the United States, nor committed acts here out of which the cause of action arose, nor engaged in conduct outside the United States which had significant, foreseeable effects within the United States.

While the principles applied in determining personal jurisdiction resemble in many respects those relevant to consideration of subject matter jurisdiction, they are not identical or co-extensive. Each is directed to the protection of different interests. In considering subject matter jurisdiction, it was the transaction that was the point of focus

^{10.} The lack of *in personam* jurisdiction was also raised by the defendants who are parties to the proposed settlement as approved by the court. Since the issue of personal jurisdiction, in contrast to subject matter jurisdiction which was determined before the court approved the proposed settlement, was decided after the settlement was approved, that issue was not considered as to those who are parties to the proposed settlement.

and therefore the defendants could be viewed collectively as they were tied to the transaction. Personal jurisdiction, as the phrase itself connotes, requires that each party's connection with the forum be individually assessed.

The jurisdictional sections of the securities laws (Section 22(a) of the Securities Act and Section 27 of the Exchange Act) have been interpreted as extending their reach as far as the due process clause of the Fifth Amendment will allow. As was held in Leasco Data Processing Corp. v. Maxwell, supra, 468 F.2d at 1340:

"... it is reasonable to infer that Congress meant to assert personal jurisdiction over foreigners not present in the United States to but, of course, not beyond the bounds permitted by the due process clause of the Fifth Amendment. . . . "

It is apparent that neither of these defendants was "present" or "doing business" in the United States in the traditional sense, so as to establish personal jurisdiction. See Hanson v. Denckla, 357 U. S. 235 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945). Crang was a Canadian brokerage house with no office, bank accounts, telephone listings, subsidiaries or affiliates in the United States. Nor did it have salesmen in the United States. I. O. S., at the time of the transaction in question, was a Canadian corporation with its principal place of business in Geneva, Switzerland. It did not maintain offices in the United States and was, in fact, restricted from engaging in securities transactions in the United States.¹¹ Neither of these corporations can be said to have engaged in systematic and continuous activity within the United States, invoking the benefits and protections of its laws. Hanson v. Denckla, supra. See also, Restatement (Second) Conflict of Laws, §47.

^{11.} The question of whether I. O. S. could be considered to have been doing business in the United States by virtue of its subsidiaries or other entities, need not be reached in light of the disposition to follow.

Nevertheless, though not present or doing business in the United States, parties may come within the personal jurisdiction of this court. See Restatement (Second) Conflict of Laws, §§49 and 50. The Court in Leasco, stated at 1340:

"... where a defendant has acted within a state or sufficiently caused consequences there, he may fairly be subjected to its judicial jurisdiction even though he cannot be served with process in the state..."

Even under the lesser standard of committing acts within the forum rether than engaging in systematic activity, Crang cannot be deemed to have satisfied in personam jurisdictional threshold requisites. The only acts of Crang within the United States related to the transaction in question appear to have been the breakfast meetings between Howe and Cowett. These de minimis preliminary discussions can hardly be considered acts out of which the cause of action arose. cf. International Shoe, supra. There has been no showing that they were related to the alleged misleading statements and omissions in the prospectuses. Moreover, plaintiff's purchase of I. O. S. shares does not appear to have been made in reliance on statements in the Crang prospectus, since that prospectus was sent to the United States after the date of purchase. The evidence reveals that Crang investigated I. O. S.'s affair and prepared the prospectus in Canada, Switzerland and France. It accepted orders for I. O. S. stock in Toronto and sold shares only outside the United States and only to non-Americans.

As to I. O. S., the conclusion is different. The facts detailed earlier reveal that top I. O. S. officials were in the United States repeatedly during the planning of the offering, conferring with the lead underwriters and attorneys. Their meetings were directly related to the offerings, and information was discussed which later was incorporated into the prospectuses.

The second half of the jurisdictional test articulated by this Circuit in *Leasco*, namely—whether acts outside the United States sufficiently caused consequences here—remains to be applied to Crang. As defined by the Court, at 468 F. 2d 1341:

"But this is a principle that must be applied with caution, particularly in an international context... At minimum the conduct must meet the tests laid down in §18 of the Restatement (Second) of Foreign Relations Law, including the important requirement that the effect 'occurs as a direct and foreseeable result of the conduct outside the territory.' We believe, moreover, that attaining the rather low floor of foreseeability necessary to support a finding of tort liability is not enough to support in personam jurisdiction. The person sought to be charged must know, or have good reason to know, that his conduct will have effects in the state seeking to assert jurisdiction over him."

The conduct abroad of the individual party must have a substantial, direct, and foreseeable result in the United States.

In finding subject matter jurisdiction, it was significant that several hundred Americans purchased I. O. S. stock pursuant to the I. O. S. prospectus. Here, where Crang did not sell I. O. S. shares to any American citizen, took precautions to prevent and placed restrictions on the sales to Americans, and understood that all other parties to the offering would observe similar restrictions, it would be difficult to conclude that its conduct was designed to have an effect within the United States. Moreover, as noted in the section on subject matter jurisdiction, supra, the impact on the American securities market of the I. O. S. offering was in fact less than direct. The absence of clearly provable or probable negative domestic impact is close to fatal in the context of personal jurisdiction where impact per se is not the gravamen; rather the issue is whether there has

been impact which a party had good reason to foresee. Applying this more stringent standard, I cannot reasonably conclude that the conduct of Crang abroad justifies or permits the exercise by this court of personal jurisdiction over it.¹²

Plaintiff's remaining theory of jurisdiction, i.e., that individual defendants served as aiders and abettors, does not help create personal jurisdiction over Crang. As already indicated, Crang committed no acts within the United States which substantially fostered or made possible the allegedly fraudulent transaction. Moreover, acts within the United States of some conspirators do not confer jurisdiction over foreign co-conspirators. As held in Leasco Data Processing Corp. v. Maxwell, supra, at 1343, "The rule in this circuit is that the mere presence of one conspirator . . . does not confer personal jurisdiction over another alleged conspirator." See, also, H. L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories, 384 F. 2d 97, 98 (2d Cir. 1967); Bertha Building Corp. v. National Theatres Corp., 248 F. 2d 833, 836 (2d Cir. 1957), cert. denied, 356 U.S. 936 (1958).

In conclusion, personal jurisdiction exists as to I. O. S., but is lacking as to Crang.

Remaining Contentions

Defendants Cornfeld and I. O. S. add a third string to their jurisdictional bow. They correctly observe that no matter how closely tied they or the 1969 offering are to the United States, this court may not exercise jurisdiction over

^{12.} While jurisdiction over I. O. S. does rest on its acts within the United States, it is likely that such jurisdiction could be buttressed under the "effects" test. I. O. S., as the central figure in the transaction, had the most direct relationship to the information in the prospectus as well as the mechanics of the offering. It was also well aware of its ties to the United States securities market. Fraudulent sales to Americans, as well as the impact on the domestic market, were or should have been foreseeable results of its activities abroad.

them unless proper service of process has been made upon them. Section 22(a) of the Securities Act of 1933 (15 U. S. C. §77(a) and §27 of the Securities Exchange Act of 1934 (15 U. S. C. 78aa) expressly authorize extra-territorial service in any district "of which the defendant is an inhabitant or wherever the defendant may be found." However, they do not prescribe the manner in which service must be effected. Rule 4(i)(1)(D), F. R. Civ. P., is designed to fill such statutory gaps and provides for service "by any form of mail, requiring a signed receipt to be addressed and dispatched by the clerk of the court to the party to be served."

I. O. S. contends that it was not "found" at either the addresses where service was attempted. Plaintiff first sought to serve I. O. S. in 1972 by dispatching to I. O. S. at "99 Aldwych, London, W. C. 2, England" a copy of the summons and complaint, return receipt requested. The envelope containing the summons and complaint was returned to sender, and bore the handwritten word "Refused" and a series of markings which appear to be initials. In December of 1973, plaintiff consented to the vacation of a default judgment entered against I. O. S. three months earlier, without conceding that the original service of process had been invalid. Nevertheless, in February, 1974, plaintiff again attempted to serve I. O. S. by registered mail, this time dispatching a summons and complaint to 147 Rue de Lausanne, Geneva, Switzerland, and to 22 King Street, St. John, New Brunswick, Canada.

I. O. S. attacks the original service principally on the ground that I. O. S. did not at any time herein relevant maintain an office or otherwise transact business at the London address and accordingly could not be "found" there. Although plaintiff has at various times vouched (with decreasing ardor) for the process by which he obtained an address where I. O. S. could be served, and has urged this court to infer from the fact that someone in London refused service that it was I. O. S. who refused

service, plaintiff does not directly dispute that the London address was not I. O. S. territory.

The subsequent attempts at service are, however, less vulnerable to attack. I. O. S. concedes that the Geneva address was for years the site of its principal executive offices, but argues that in February, 1974, it could no longer be "found" there since five months earlier liquidation proceelings had been commenced in Canada, the country where it was headquartered and domiciled. To the extent that I. O. S. insists it could only be "found" at the place of business of its co-liquidators, it suggests too restrictive a standard of where a corporation may be found. Cf., United States v. Scophony Corp., 333 U.S. 795 (1948). See also, Wash-Virginia Ry v. Real Estate Trust, 238 U.S. 185 (1914). To the extent that I. O. S. relies on its own representation that none of its employees remained at the Geneva address in February, 1974, a fact issue is raised. However, that question need not be resolved because the attempted service in New Brunswick. Canada, substantially satisfies the statute. Indeed, I. O. S. does not deny that the New Brunswick address was the "head office" of the company. Rather, it points to the fact that the complaint and summons sent to New Brunswick were returned to sender as proof that I. O S. was not found at that address. But such a literal construction of "found" would mean that a defendant could avoid service of process merely by returning the summons.

I. O. S. further argues that even if it was "found" at one of the three addresses, none of the attempted services conformed to the procedural requirements of Rule 4(i)(2) which provides:

"When service is made pursuant to [Rule 4(i)(1) (D)], proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court."

Since the summons sent to New Brunswick was not accepted, it would be unreasonable to require as proof of

service a receipt signed by the addressee, and proof of service must be sought elsewhere. Upon examination of the postmarks and other official markings which appear on the returned envelope (Exhibit C of plaintiff's memorandum in opposition to the motion), the court is convinced that delivery was in fact made to the New Brunswick address. Finally, I. O. S. insists that service was defective because the return receipt required by Rule 4(i)(1)(D) was returnable to plaintiff's counsel rather than to the clerk of the court. However, the Rule only requires that the clerk attend to the mailing out of the notice. Here, the clerk did so, in response to a letter from plaintiff's counsel dated January 21, 1974.

Defendant Cornfeld's objection to service of process is more readily disposed of. He objects to the service in May, 1973, of a summons and complaint upon Ms. Diethild Gainer at a residence in Beverly Hills, California. However, the court need not speculate as to the relationship between Mr. Cornfeld and Ms. Gainer, or between either of them and the California abode, because in February, 1974, service was made pursuant to Rule (i)(1)(D) on defendant Cornfeld in St. Antoine Prison where he was indisputably "found."

Defendant I. O. S.'s final service of process argument is that the due process requirement set forth in Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 314 (1950)—that "notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"—is not here satisfied. However, the fact that defendant moved in 1973 to overturn the default entered against it manifests an awareness of the pendency of the action, and Judge Ryan's order of December 5, 1973, vacating that default provided defendant a fair opportunity to present its objections. Thus, by the time a technically correct service of process was effected in February, 1974, I. O. S. had actual notice of the proceeding

and was an active participant therein. Under all the circumstances, due process was satisfied.

Having thus determined that both subject matter and personal jurisdiction lie, the court must decide whether it should in the exercise of its discretion decline to exercise its jurisdiction. The motions made by certain of the defendants for dismissal on grounds of comity or forum non conveniens, and I. O. S.'s motion for a stay of proceedings are not well taken. However, more troubling are the motions made by defendants I. O. S. and Cornfeld to dismiss

for failure to prosecute.

Plaintiff has not deigned to explain to the court why a year passed between its filing of the complaint and its first attempt to serve the moving defendants. Plaintiff's contention that it delayed issuing summonses until it obtained a full description of I. O. S.'s and Cornfeld's contacts with the United States rings hollow when played against the background of early service on defendants like Crang and Banque Rothschild. A more ingenuous explanation might have enabled the court to determine whether plaintiff's lack of diligence in prosecuting this action as against the movants was excusable. However, the particular circumstances of this case lead me to conclude that plaintiff's lack of diligence was, irrespective of the reasons for it, moderate rather than grave. Unlike the plaintiff in Link v. Wabash R. Co., 370 U.S. 626 (1962), the plaintiff here has not blocked or retarded the orderly and expeditious disposition of its own case. Although this action has in general proceeded at a reasonable pace, it is still at an early stage of development. Threshold questions of jurisdiction are just now being decided, and defendants I.O.S. and Cornfeld were brought into the case soon enough to play a substantial role in focussing the jurisdiction inquiry.

Even though plaintiff's delay in serving the movants may be characterized as "moderate neglect," the question remains whether defendants were prejudiced by the delay. *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956).

Indeed, in every case where an alleged failure to prosecute arises out of a delay in serving one defendant even though other defendants have been served and diligently proceeded against, it would seem analytically sounder to assess the prejudice vel non suffered by the odd-defendant-out rather than to assess the degree of the plaintiff's "neglect" as to that defendant. Here, I am reasonably convinced that any "prejudice" suffered by defendants I.O.S. and Cornfeld has resulted from the passage of time rather than from the service delay. Even had I.O.S. been served the same day the action was commenced, its ability to defend itself would have been affected by changes in personnel and control. There is no reason to believe that had these two defendants been served sooner this complex multiparty litigation would have proceeded more quickly or fairly. Up to this point, discovery has been limited to jurisdictional questions; and the movants have had ample opportunity (and taken advantage of same) to test out the court's jurisdiction. Accordingly, the motions to dismiss for failure to prosecute are denied.

CONCLUSION

The motions of all defendants to dismiss for lack of subject matter jurisdiction are denied. The motion of Crang to dismiss for lack of personal jurisdiction is granted, and the motion of I.O.S. to dismiss, for lack of personal invisdiction is denied. The motions by I.O.S. and Cornfeld to dismiss because of defective service of process are denied, as are their motions alleging a failure to prosecute. The motions seeking dismissal on grounds of comity and forum non conveniens are denied as is I.O.S.'s motion for a stay of proceedings.

SO ORDERED.

Dated: New York, New Yo. November 26, 1974

/s/ Robert L. Carter
ROBERT L. CARTER
U.S.D.J.

ON REQUEST FOR CERTIFICATION

The defendants have asked that the court's determination that it has subject matter jurisdiction and in personam jurisdiction over I.O.S. and Cornfeld filed this day be certified for appeal to the United States Court of Appeals pursuant to 28 U.S.C. §1292(b). The issue of subject matter jurisdiction clearly meets the statutory criteria. While the jurisdictional reach of our securities laws has been settled and clarified by our Court of Appeals in Schoenbaum v. Firstbrook, 405 F. 2d 215 (2d Cir. 1968) and Leasco Data Processing Corp. v. Maxwell, 468 F. 2d 1326 (2d Cir. 1972), there is substantial ground for difference of opinion as to whether the ratio decidendi of those cases was properly applied in the instant case. Moreover, the question of subject matter jurisdiction is a controlling issue of law in this case. If the court is in error, the whole controversy could be terminated. The basis for the court's determination was that the tripartite offerings involved were an integrated entity and not three distinct, separate and independent transactions. An immediate appeal, if the court is in error, will materially advance the ultimate determination of the controversy and "would save * * * the cost and delay of protracted and expensive litigation." Bobolakis v. Campania Panamena Maritima San Gerassimo, 168 F. Supp. 236, 240 (S.D.N.Y. 1958). Therefore, the request that the determination in respect of subject matter jurisdiction be certified for appeal pursuant to 28 U.S.C. §1292 (b) is granted.

The determination that in personam jurisdiction is lacking as to defendant Crang is made final and entry of final judgment is ordered entered pursuant to Rule 54(b), F. R. Civ. P.

However, I do not regard the conclusion that in personam jurisdiction exists in respect of I.O.S. and Cornfeld as meeting the requisites for certification. The standards for holding I.O.S. and Cornfeld personally subject to the court's jurisdiction are too well established and firmly fixed

for there to be much room for difference of opinion as to the conclusion reached by the court that personal jurisdiction over these defendants exists. The cases cited and relied on in the personal jurisdiction section of the opinion leave little basis for a contrary conclusion. Accordingly, the question is not certified for appeal.

Dated: New York, New York November 26, 1974

/s/ ROBERT L. CARTER

ROBERT L. CARTER U.S.D.J.

283 A Order of Carter, D.J. re Notice of, and Hearing on, Proposed Settlement

PRRED, MAGOLL & MORGA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

HOWARD BERSCH,

Plaintiff,

71 Civ. 5373

(RLC)

-against-

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL & CO., LIMITED, GUINNESS MAHON & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY & CO. INCORPORATED, J.H. CRANG & CO., INVESTORS OVERSEAS BANK LIMITED, ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,

Defendants.

ORDER

Plaintiff and defendants Banque Rothschild,

Guinness Mahon & Co., Limited, Hill Samuel & Co., Limited,

Lexerd & Co., Inc., Pierson, Heldring & Pierson, and Smith,

Barney & Co. Incorporated (the "Settling Defendants") having

stipulated to the compromise and dismissal of this action

as to them upon the terms and conditions set forth in a

Stipulation of Settlement dated June 28, 1974,

IT IS ORDERED as follows:

1. A hearing shall be held before this Court on March 21, 1975, at 10:00 A.M., in Room 2903, United States Courthouse, Foley Square, Borough of Manhattan, County, City and State of New York, for the purpose of determining whether the Stipulation of Settlement is fair, reasonable, and adequate

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and should be approved by the fourt and final judgment should be entered dismissing this action against the Settling Defendants with prejudice and on the merits and for the consideration of applications for counsel fees and disbursements and expenses of litigation on behalf of the class.

- 2. At said hearing, each member of the plaintiff class may show cause, if he has any, why the Stipulation of Settlement should not be approved as fair, reasonable and adequate, why this action should not be dismissed against the Settling Defendants with prejudice and final judgment entered and why attorneys' fees and disbursements and expenses of litigation should not be awarded. No member of the class will be heard and no papers submitted by or on behalf of any class member will be received or considered by the Court at or in connection with such hearing, unless such class member files prior to March 6, 1975 a written statement of his position together with copies of all other papers to be submitted by him with the Clerk of this Court and serves copies of said papers upon Silverman & Harnes, 75 Rockefeller Plaza, New York, New York 10019, attorneys for plaintiff; Davis Polk & Wardwell, attorneys for Banque Rothschild and Smith, Barney & Co., incorporated, One Chase Manhattan Plaza, New York, New York 10005, and Sullivan & Cromwell, 48 Wall Street, New York, New York 10005, attorneys for defendants Lexerd & Co., Inc., Guinness Mahon & Co., Limited, Hill Samuel & Co., Limited and Pierson, Heldring & Pierson, on or before March 6, 1975.
- 3. Each of the Settling Defendants, at their expense except as hereinafter provided, shall give notice of said hearing (substantially in the form annexed hereto) by mail and by publication as follows:

A. Each Settling Defendant shall mail the notice on or before December 20, 1974 to each person who purchased from it at retail the common stock of I.O.S., Ltd. upon the public offering or offerings made in September 1969. Such notice shall be mailed, postage prepaid, to each such purchaser at the last known address recorded in the records of the selling Settling Defendant.

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- B. The Settling Defendants shall request in writing that each underwriter or dealer known to have participated in the September 1969 offering or offerings of the common stock of I.O.S., Ltd. managed by the Settling Defendants, by Investors Overseas Bank Limited and by J. H. Crang & Co. promptly mail such notice to each person who purchased the common stock of I.O.S., Ltd. upon such public offerings from such underwriter or dealer. Upon reasonable request of any such underwriter or dealer, the Settling Defendants shall furnish a sufficient number of copies of said notice for said purpose; provided, however, that the Settling Defendants shall not be required to pay or advance any other expense of notice except postage to be given by such underwriter or dealer.
- C. The Settling Defendants shall cause said notice to be published on or before January 5, 1975 in The New York Times, The International Herald Tribune (Paris), the Montreal Gazette, and the Globe and Mail (Toronto).

D. The Settling Defendants shall cause to be filed in this Court, on or before the date of this hearing, proof of mailing and publication as herein provided.

U.S.D.J. Part

December 4 , 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES OF AMERICA

HOWARD BERSCH,

Plaintiff,

-against-

and BERNARD CORNFELD,

DREYEL FIRESTONE, INC., DREXEL
HARRIMAN RIPLEY, BANQUE ROTHSCHILD,
HILL SAMUEL & CO., LIMITED,
GUINNESS MAHON & CO., LIMITED,
PIERSON, HELDRING & PIERSON, SMITH,
BARNEY & CO. INCORPORATED,
INVESTORS OVERSEAS BANK LIMITED,
ARTHUR ANDERSEN & CO., I.O.S., LTD.

(RLC)

71 Civ. 5373

Defendants.

TO: ALL PURCHASERS IN THE PUBLIC OFFERING OR OFFERINGS COMMENCING SEPTEMBER 1969 of 11,000,000 SHARES OF 1.O.S., LTD. COMMON STOCK

United States District Court for the Southern District of
New York filed December 5, 1974 a hearing will be held in
Room 2903, United States Courthouse, Foley Square, Borough of
Manhattan, County, City and State of New York, United States
of America, at 10:00 A.M. on March 21, 1975 to determine
hether a proposed partial settlement and compromise of the
above-entitled action brought on behalf of a class composed
of all purchasers in the public offering or offerings commencing in September 1969 of 11,000,000 shares of I.O.S., Ltd.
("IOS") common stock should be approved and confirmed by the
Court as fair, reasonable and adequate and, if such settlement

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J. H. Crany & Cor., and compromise be approved, to determine the allowance to be made for the attorneys' fees and disbursements and expenses of litigation on behalf of the plaintiff class. The hearing may be adjourned from time to time by the Court at the hearing or at any adjourned session thereof without further notice.

PLEASE TAKE FURTHER NOTICE that the partial settlement of this action, if approved by the Court, will include a class consisting of all persons who purchased the common stock of IOS in the public offering or offerings which commenced in September 1969 and will be binding upon all members of such class who do not request to be excluded from such class. Any member of the class will be excluded from the class if he so requests in writing received by the Clerk of this Court on or before March 6, 1975. Unless this Court's order dated June 28, 1972 (which determined that the present action may be maintained as a class action on behalf of the class described above) should be vacated or modified in the future (see "Summary of Issues and Contentions" below), any judgment in this action, whether or not favorable to the plaintiff class, will include all members who do not request exclusion from the class and will be binding upon all class members who do not so request exclusion. Any member of the class who does not request exclusion from the class may, if he desires, enter an appearance through his counsel.

Any member of the class who desires to do so may appear at such hearing in person or by counsel and show cause, if he has any, why the settlement and compromise hereinafter described should not be approved, why this action should not be dismissed on the merits and with prejudice against the

Settling Defendants and why attorneys' fees and disbursements and expenses should not be awarded in the amounts described below; provided, however, that no person shall be heard with respect to the proposed settlement and compromise and no papers or briefs submitted by any such persons shall be received or considered unless on or before March 6, 1975. such person shall file with the Clerk of this Court a written statement of his objections and copies of such papers or briefs and serve copies thereof upon Messrs. Silverman & Harnes, 75 Rockefeller Plaza, New York, New York 10019, United States of America, who are counsel for plaintiff Howard Bersch; Messrs. Sullivan & Cromwell, 48 Wall Street, New York, New York 10005, United States of America, who are counsel for defendants Lexerd & Co., Inc. (formerly known as Drexel Firestone, Inc. and Drexel Harriman Ripley), Hill Samuel & Co., Limited, Guinness Mahon & Co., Limited and Pierson, Heldring & Pierson; and Messrs. Davis Polk & Wardwell, One Chase Manhattan Plaza, New York, New York 10005, United States of America, who are counsel for Banque Rothschild and Smith, Barney & Co. Incorporated.

SUMMARY OF ISSUES AND CONTENTIONS

This action was brought on December 9, 1971, with respect to a public offering or offerings of 11,000,000 shares of IOS common stock commencing in September 1969. The complaint alleged, inter alia, on behalf of plaintiff Howard Bersch and all other purchasers in the offering or offerings ("the plaintiff class") that the offering circulars distributed to the class in connection with the offering or offering.

were false and misleading in violation of the United States
Securities Act of 1933 and the United States Securities Exchange Act of 1934 and that by reason thereof, plaintiff and
each member of the plaintiff class was entitled to recovery
of damages against the defendants. No specific amount of
damages is alleged in the complaint, and the amount of
damages (if any) would depend upon the consideration (if
any) received by each class member upon any disposition of
his IOS common stock; but since the offering price of the IOS
common stock in the September 1969 offering or offerings was

U.S. \$10.00 per share, the total amount of damages could not

exceed U.S. \$110,000,000 and might be substantially smaller.

The defendants in the action are: the Settling Defendants (Banque Rothschild, Guinness Mahon & Co., Limited, Hill Samuel & Co., Limited, Lexerd & Co., Inc. (formerly known as Drexel Firestone, Inc. and Drexel Harriman Ripley), Pierson, Heldring & Pierson and Smith, Barney & Co. Incorporated ("Smith, Barney")), who were managing underwriters with respect to the offering of 5,600,000 shares of 10S common stock; and the Non-Settling Defendants - Investors Overseas Bank Limited ("IOB"), who were managing underwriters of another public offering of 3,950,000 shares of IOS common stock; Arthur Andersen & Co. ("Andersen"), accountants to IOS; IOS itself, and Bernard Cornfeld, formerly Chairman of the IOS Board of Directors. There was a third public offering of foreign under-1,450,000 shares of IOS common stock. The writer which managed that offering was dismissed from the action for lack of personal jurisdiction.

The defendants deny the material allegations of the complaint and assert that the claims asserted against them are without merit. This Court has made no determination with

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respect to the merits of thi action or of any claim asserted against any defendant.

By order dated June 28, 1972, the United States

District Court for the Southern District of New York determined that this action may be maintained as a class action on behalf of all purchasers in the public offering or offerings described above of 11,000,000 shares of IOS common stock. This determination may be altered or amended at any time during the pendency of this litigation.

On or about October 31, 1973, the Settling Defendants moved for orders altering and amending the Court's class determination of June 28, 1972 to provide that this action may not be maintained as a class action, or, alternatively that non-United States nationals who purchased ou side the United States be excluded from the class. Similar motions were made by all of the Non-Settling Defendants. Defendants Banque Rothschild and Smith, Barney moved the Court to dismiss the complaint against them for lack of subject matter jurisdiction; similar motions were made by defendants Andersen, IOS, and Cornfeld. Defendants Banque Rothschild, Guinness Mahon & Co., Limited, Hill Samuel & Co., Limited and Pierson, Heldring & Pierson also moved the Court to dismiss the complaint against them for lack of personal jurisdiction; similar motions were made by defendants IOS and Cornfeld. Defendants IOS and Cornfeld moved to dismiss the complaint against them for failure to prosecute and lack of proper service of process, and IOS also moved to stay the action against it.

The Court has denied the motions of defendants

Banque Rothschild, Smith, Barney, Andersen, IOS, and
Cornfeld to dismiss the complaint against them for lack of
subject matter jurisdiction. The Non-Settling Defendants
have indicated that they will appeal this determination;
defendants Banque Rothschild and Smith, Barney will not
appeal it if the proposed Stipulation of Settlement is
approved. The Court has not yet decided the other motions
filed by the Settling Defendants, and will not decide such
motions in the event that the proposed Stipulation of
Settlement is approved. The Court decide all of the motions
made by defendants IOS and Cornfeld, as described in the first
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The Stipulation of Settlement submitted to the Court for its approval provides that its purpose is to avoid the expense, inconvenience, distraction and delay of further litigation against the Settling Defendants, and to assure appropriate benefits to members of the class from the final disposition of the litigation as to the Settling Defendants.

If the Stipulation of Settlement is approved by the Court and is consummated in accordance with its terms, the action will remain pending against the Non-Settling Defendants (see "Summary of Issues and Contentions" above).

The Stipulation of Settlement provides, in substance, that the Settling Defendants will create a Settlement Fund of \$700,000. After payment from the Settlement Fund of expenses and counsel fees as determined by the Court, the Settlement Fund will be distributed to the members of the class, in proportion to their losses, at such time and in such manner as

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the court may direct. In order to participate in this distribution, members of the class will be required to submit to the Court proofs of claim substantiating their losses and releasing all claims against any of the Settling Defendants relating to or arising from the offering or offerings of IOS common stock in September 1969.

The Stipulation of Settlement provides further that this action will be dismissed with prejudice and on the merits as against the Settling Defendants, that the Settling Defendants will be released and discharged from the claims alleged in the complaint and that members of the plaintiff class will be barred and enjoined from asserting such claims against the Settling Defendants.

The Stipulation of Settlement further provides that the Settling Defendants may withdraw from the settlement at any time prior to five days before the date set for hearing if members of the plaintiff class holding in the aggregate more than 300,000 shares of IOS common stock elect to be excluded from the plaintiff class.

As noted above, the action will remain pending against the Non-Settling Defendants. Accordingly, the Stipulation of Settlement reserves to plaintiff and the plaintiff class all rights whatsoever against the Non-Settling Defendants, except that the Non-Settling Defendants will be released and discharged from all claims by the plaintiff class to the extent of any claims, by way of indemnity, contribution or otherwise, adjudicated against the Settling Defendants in favor of the Non-Settling Defendants and arising out of or relating to any of the events, matters or transactions alleged in the complaint in this action.

The Stipulation of Settlement provides further that in the event of recovery by the plaintiff class against any of the Non-Settling Defendants, the Settling Defendants will be indemnified and held harmless, as a first charge upon any amount so recovered, against any and all liabilities or expenses, including counsel fees and the expense of litigation incurred by them, by reason of the assertion by the Non-Settling Defendants against the Settling Defendants of any claim, whether by cross-claim, third-party claim or otherwise, arising out of or relating to any of the events, matters or transactions alleged in the complaint in this action, and providing further that the Settling Defendants shall be indemnified and held harmless as a first charge upon any such recovery for any expenses necessarily and fairly incurred by the Settling Defendants in connection with furnishing evidence in this action by deposition, discovery, at trial or otherwise. If the proposed plan of settlement is not finally approved, the Settling Defendants will make no payments and the case will proceed as though no settlement had been proposed.

ALLOWANCE OF EXPENSES AND ATTORNEYS' FEES

Counsel for plaintiff and the plaintiff class, the law firm of Silverman & Harnes, intends to apply to the Court for a fee in the amount of \$200,000 and for reimbursement for payment of litigation disbursements and expenses incurred on behalf of the class, which are now in the amount of approximately \$10,000 and may be increased by services rendered hereafter. All such allowances and expenses will be paid from the Settlement Fund.

The foregoing references to the Stipulation of Settlement, the pleadings, and other documents in this action are only summaries thereof. The complete texts are on file with the Clerk of the United States District Court for the Southern District of New York at the United States Courthouse, Foley Square, Borough of Manhattan, County, City and State of New York, United States of America, and are available for inspection there during regular business hours. Copies of deposition transcripts and documents produced by the defendants will be available for inspection by any member of the class or his attorneys during regular business hours at the offices of counsel for the plaintiff.

NOTICES TO THE COURT

All communications or notices to the Court with respect to this Notice or this action should be addressed by first-class mail or its equivalent to

IOS Litigation
P. O. Box 211
Radio City Station
New York, New York 10019
United States of America

Dated: New York, New York December 5, 1974

> Clerk, United States District Court, Southern District of New York

Affidavit of Marc Bonnant re Swiss Proceedings

7 301 1974

UNITED	ST	ATES	DIST	RIC	T'	COURT	1
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HOMARD BERSCH,

Plaintir, :

71 Civ. 5373

AFTIDAVIT

(RLC)

REFERRED TOP

-against-

DREXEL FIRESTONE, INC., et al., :

Defendants. :

PECEIVED BY, MAI

JUL 1 1 1974

EMBASSY OF THE UNITED STATES)
: US.:
OF AMERICA AT SWITZERLAND)

MARC BONNANT, being duly sworn, deposes and says:

- 1. I am a member of the Geneva Bar and a practicing attorney in Geneva, Switzerland. I am representing Mr. Bernard Cornfeld in connection with proceedings pending in Switzerland arising from an I.O.S., Ltd. ("IOS") stock offering in 1969.
- 2. I have read an affidavit of Sidney B. Silverman dated April 12, 1974, which refers to a discussion between Mr. Silverman and Antoine Hafner, a Geneva attorney, concerning Mr. Hafner's representation of numerous clients who purchased IOS stock at the 1969 public offering. The affidavit states:

"Mr. Hafner informed me [in the fall of 1973] that although a criminal action was then pending in the courts in Switzerland, his clients could not bring in Switzerland any civil damages suit in connection with their purchases of IOS stock."

3. I can state as a Geneva attorney that there is nothing in Swiss federal law or Geneva Cantonal law preventing Mr. Hafner's clients from bringing actions in Switzerland for

civil damages in connection with their purchases of IOS stock.

These clients can bring such civil lawsuits as a matter of legal right.

4. Moreover, the Geneva judicial system provides for recovery of civil damages as part of a criminal lawsuit and Mr. Harner is already pursuing this form of relief for his clients. There is currently pending an investigation by a Geneva magistrate into alleged crimes relating to the 1969 IOS public offering. In the Geneva criminal proceedings, Mr. Hafner has stated on numerous occasions that he is seeking to recover civil damages and reparations against Mr. Cornfeld and others on behalf of hundreds of clients who purchased IOS stock in 1969. I have also seen hundreds of simplified xeroxed forms prepared by Mr. Hafner to facilitate the filing of multiple claims by his clients in the Geneva criminal courts. Mr. Hafner stated that these claims are representative of a much larger group of his clients. Mr. Hafner has asserted civil damage claims on behalf of the larger group in his intervention in the criminal proceedings. The same forms could, of course, also be utilized to facilitate the filing of additional claims in the Geneva civil courts. In fact, to date, another 90 European purchasers of IOS stock at the public offering in 1969 -- all clients of Mr. Hafner -- have already settled their claims in the course of the proceedings pending in Geneva and have received payment. The Geneva proceedings are now continuing with discovery. Mr. Cornfeld has participated throughout these proceedings and has denied all claims of wrongdoing. There cre also current negotiations pending regarding the settlement of approximately 200 more claims of IOS stock purchasers. These

Settlement discussions involve IOS shareholders from a number of European countries and also include some United States citizens who were resident in Europe in 1969 at the time of the IOS public offering.

Swiss procedure, Mr. Hafner has continuously represented a large group of IOS purchasers and used identical forms on behalf of all of them in seeking civil reparations. A Committee for the Defense of Swiss Employees who are stockholders in IOS was also formed in October 1971, and its members retained Mr. Hafner to represent their interests. Mr. Hafner has received from his clients the sum of 1 Swiss franc for each IOS share purchased. In addition, Mr. Hafner, as representative of this group, also received a lump-sum fee of 50,000 Swiss francs in connection with the settlement that has been consummated with 90 of his clients. Accordingly, any suggestion that European purchasers of IOC stock do not have an adequate judicial forum in Switzerland or that they are not receiving adequate representation by well-compensated counsel in Switzerland is without foundation.

MARC BONNANT

Sworn to before me this

day of Jum , 1974.

1. Muland

Order of United States Court of Appeals for the Second Circuit Granting Motion for Stay United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY.

HON. WILLIAM H. TIMBERS,



Circuit Judges.

HO RD BERSCH,

v.

Plaintiff,

DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH, BARNEY & CO. INCORPORATED, J.H. CRANG & CO., INVESTORS OVERSEAS BANK LIMITED, ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,

Defendants.

Docket No. 74-8400

Counsel for defendant Arthur Andersen & Co. and counsel for defendant Bernard Cornfeld having moved for a stay of the parties to a proposed partial settlement of the above-entitled action from mailing a notice of the proposed settlement in accordance with an order of District Judge Carter made December 4, 1974, and argument thereon having been heard, it is

Ordered that the said motion for a stay be, and it hereby is granted until the pending motion for leave to appeal to this court, under 28 U.S.C. § 1292(b), from the decision of the district court that it has subject matter jurisdiction of this action is determined and, if such motion for leave to appeal should be granted, for such further period, if any, as shall then be provided. Because of the close relationship between the motion for a stay and the motion for leave to appeal, the Clerk is directed to refer the said motion for leave to appeal to a panel consisting of Judges Timbers and Friendly and, since Judge Gurfein, the other member of this week's panel, has disqualified himself, Judge Mulligan. The court retains jurisdiction to impose upon the moving parties any expenses caused to the plaintiff or the settling defendants by the stay herein granted, if such expenses should be allowed in the interest of justice.

MILLIAM II. TIMBERS

Notice of Motion of I.O.S., Ltd., for a Stay of Proceedings, Dated April 16, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

HOWARD BERSCH,

0

Plaintiff, : 71 Civ. 5373 (R.L.C.)

-against-

NOTICE OF MOTION BY DREXEL FIRESTONE, INC., et al., : DEFENDANT I.O.S., LTD. FOR STAY OF PROCEEDINGS

Defendants.

PLEASE TAKE NOTICE that upon the affidavit of Herbert M. Wachtell, sworn to the 16th day of April, 1974, and upon all prior papers and proceedings herein, the undersigned will move this Court before the Honorable Robert L. Carter, at a date, time and place to be fixed by the Court, in May, 1974, in the United States Courthouse, Foley Square, New York, for an order, pursuant to the inherent equitable powers of this Court and in accordance with the doctrine of international comity, staying all proceedings herein as against defendant I.O.S., Ltd., on the ground that it is now in liquidation in Canada, the country of its corporate domicile, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York April 16, 1974

WACHTELL, LIPTON, ROSEN & KATZ

A Member of the Firm

Attorneys for Defendant I.O.S., Ltd. Office and P.O. Address 299 Park Avenue New York, New York 10017 Tel. No. (212) 371-9200

TO:

SILVERMAN & HARNES Attorneys for Plaintiff One Rockefeller Plaza New York, New York 10020

DAVIS POLK & WARDWELL
Attorneys for Defendants Smith, Barney
& Co. Incorporated and Banque Rothschild
One Chase Manhattan Plaza
New York, New York 10005

GOLD, FARRELL & MARKS Attorneys for Defendant Bernard Cornfeld 595 Madison Avenue New York, New York 10022

BREED ABBOTT & MORGAN Attorneys for Defendant Arthur Andersen & Co. One Chase Manhattan Plaza New York, New York 10005

SULLIVAN & CROMWELL
Attorneys for Defendants Drexel Firestone,
Inc., Hill Samuel & Co., Limited, Pierson,
Heldring & Pierson and Guinness Mahon &
Co., Limited
48 Wall Street
New York, New York 10005

PAUL, WEISS, RIFKIND, WHARTON & GARRISON Attorneys for Defendant Investors Overseas Bank, Ltd. 345 Park Avenue
New York, New York 10022

WILLKIE FARR & GALLAGHER Attorneys for Defendant J. H. Crang & Co. One Chase Manhattan Plaza New York, New York 10005 302 A
Affidavit of Herbert M. Wachtell in Support of
I.O.S., Ltd.'s Motion for a Stay of Proceedings,
Sworn to April 16, 1974
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HOWARD BERSCH,

Plaintiff, : 71 Civ. 5373 (R.L.C.)

-against- : AFFIDAVIT

DREXEL FIRESTONE, INC., et al.,

Defendants. :

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HERBERT M. WACHTELL, being duly sworn, deposes and says that he is a member of the firm of Wachtell, Lipton, Rosen & Katz, attorneys for defendant I.O.S., Ltd. ("IOS"), now in liquidation.

- notion made and served herewith on behalf of IOS for an order of this Court staying all proceedings in this action against said defendant pursuant to this Court's general equitable powers and the doctrine of international comity. This motion is made alternatively to the motion of IOS, filed simultaneously herewith, for an order dismissing the complaint as to IOS on the ground that the Court lacks jurisdiction herein, both over the person of IOS and over the subject matter of the action.
- 2. The predicate of the instant motion for a stay of proceedings is the fact that IOS has recently been adjudicated insolvent in Canada, the country of its incorporation,

and is now in liquidation there pursuant to the provisions of the Winding-Up Act of Canada, Revised Statutes of Canada, 1970, Chapter W-10, and the Orders of the Supreme Court of New Brunswick. (A copy of the portions of the Winding-Up Act which are particularly relevant to this motion are annexed hereto as Exhibit "A".) By virtue of the foregoing, the affairs of IOS are now in the hands of court-appointed Co-Liquidators who are proceeding to effect the orderly liquidation of IOS pursuant to the Winding-Up Act and the orders of the Supreme Court of New Brunswick, Canada. As is more fully set forth below, the stay of proceedings requested hereby is justified and indeed required in that:

- (a) the continued prosecution of this action outside of the liquidation forum is inconsistent with the letter and spirit of the insolvency laws of both Canada and the United States and creates a grave risk of hardship and prejudice to the Liquidators and to the creditors of IOS as a whole;
- (b) the continued prosecution of this action will engender unnecessary and duplicative litigation interfering with the swift and economic administration of the IOS estate; and
- (c) plaintiff and the members of the class he purports to represent will have a full and fair opportunity to present their claims against IOS in the Canadian liquidation proceedings.

- A. IOS is presently in liquidation proceedings in New Brunswick, Canada.
- 3. In light of the crucial importance of the IOS liquidation proceedings to the instant motion, a brief statement of the history of lose proceedings and a general description of the Winding-Up Act may be helpful to the Court.
- 4. The liquidation proceedings against IOS were initiated on August 30, 1973, before Mr. Justice Dickson of the Supreme Court of New Brunswick, Canada, on the petition of the Public Trustee of the Province of Ontario, as a creditor of IOS.*

 Subsequently two additional petitions for the liquidation of IOS were filed, one by another creditor, and one by a shareholder -- all three petitions being supported by the Canadian governmental authorities. For technical reasons not here relevant, it was the last of these petitions that was granted when, on November 5, 1973, Mr. Justice Dickson, upon findings that IOS was insolvent, that its capital had been impaired, and that its liquidation would be "just and equitable", entered a Winding-Up Order, pursuant to §§ 10(c), (d) and (e) of the Winding-Up Act. Mr. Justice Dickson's Opinion and the Winding-Up Order are annexed hereto as Exhibits "B" and "C", respectively.

^{*} It is of particular significance on this motion that the filing of this first petition seeking the liquidation of IOS followed and was in great measure the result of conferences among representatives of the governments of Canada and the Provinces of Quebec and Ontario, the regulatory authorities of Luxembourg and of the United States Securities and Exchange Commission. During those conferences it was agreed, inter alia, that liquidation of various entities in the huge multi-national IOS complex would be sought by or with the assistance of the governments or regulatory authorities of the corporate domiciles of the various key corporations. Since IOS was incorporated under the Federal Companies Act of Canada (R.S.C. 1952, c. 53), primary responsibility for the liquidation of IOS devolved upon the Canadian authorities. It was further agreed at these con-

- a lengthy and thorough inquiry -- including a full-scale trial between October 15 and October 31, 1973 -- into the financial and corporate condition of IOS. These preliminary proceedings were necessitated by the resistance of the then incumbent IOS Board of Directors (the "Old Board") to the various efforts to put IOS into liquidation. A full account of these preliminary proceedings is contained in the opinion of Mr. Justice Dickson determining that liquidation proceedings were proper (see Exhibit "B" hereto). Subsequent to that decision and the entry of the Winding-Up Order, the Old Board continued its fight, but finally was defeated when leave to appeal the Winding-Up Order to the Court of Appeal was denied. (A copy of the opinion denying the application for leave to appeal is attached hereto as Exhibit "D".)
- 6. By virtue of the entry of the Winding-Up Order against IOS, its affairs became subject to the paramount control

[Footnote continued]

ferences that an informal international committee made up of representatives of the various governments and regulatory authorities referred to above would periodically meet and generally oversee the liquidation process.

The proceedings were initiated specifically in the courts of New Brunswick because IOS had its "head office" in the Province of New Brunswick in the City of Saint John. See Exhibit "A", § 12(1). The Public Trustee of Ontario filed the petition as the representative of the Crown in the right of the Province of Ontario, which had become a creditor of IOS as a result of the cancellation, by the Ontario authorities, of the charter of Transglobal Financial Services Limited ("Transglobal"), a major subsidiary of IOS and also a Canadian (Ontario) corporation, also in consequence of the international conferences described above. By virtue of the Ontario Business Corporation Act, the cancellation of Transglobal's charter resulted in the assets of Transglobal vesting in the Crown through the Public Trustee for the province of Ontario. These assets included a debt allegedly owing to Transglobal by IOS, and that made the Province a creditor for purposes of the Winding-Up Act.

of the New Brunswick Court, which is specifically empowered by the Winding-Up Act to oversee the beneficial winding up of an insolvent company. Indeed, the Act creates a comprehensive and pervasive scheme to assure this end. Thus, to assist the Winding-Up Court, the Act provides for the appointment of a liquidator or liquidators of the company (Exhibit "A", § 23) with broad powers: (a) to marshal and take charge of the company's assets; (b) to collect outstanding accounts, assess and compromise or otherwise dispose of claims, and generally administer the affairs of the company; and (c) to distribute the assets to the creditors of the company (Exhibit "A", §§ 33-40; 93-95). When the Winding-Up Order against IOS was entered, the New Brunswick Court appointed two Co-Liquidators of the estate and effects of IOS to discharge these functions. One of them, Mr. Jean-Romeo Lajoie, a Chartered Accountant and Licensed Trustee in Bankruptcy who is employed by the Department of Consumer and Corporate Affairs of the Canadian Federal Government, had previously been appointed as provisional liquidator of IOS (pursuant to \$ 28 of the Winding-Up Act) in August, when the original winding-up petition of the Public Trustee was filed, and had served in that capacity pending the determination of the Old Board's objections to the entry of a final Winding-Up Order.* The other permanent Co-Liquidator is John A.G. Page, of the City of Fredericton, New Brunswick, who is also a Chartered Accountant and Licensed Trustee in Bankruptcy. (A copy of the order appointing the Co-Liquidators is annexed hereto as Exhibit "F".)

^{*} The Order appointing Mr. Lajoie provisional liquidator had been appealed by the Old Board on procedural grounds, all of which were overruled by the Court of Appeal. (A copy of its opinion dismissing this appeal is annexed hereto as Exhibit "E".)

- Winding-Up Act provides for the centralization of claims and stay of proceedings in other courts.
- 7. The Winding-Up Act envisions that the Winding-Up Court and the liquidator or liquidators appointed by it will administer a centralized, orderly and equitable liquidation in the Winding-Up Court alone. The Act contains merous provisions designed to assure that all claims against the company in liquidation will be presented and determined solely in the liquidation forum. Thus it requires creditors to file their claims in the liquidation Court, on notice to the liquidator (Exhibit "A", § 74), and empowers the liquidator to require that claims be proved to the satisfaction of the Court before being allowed (Exhibit "A", § 75(1)). With respect to properly filed claims, the Act provides that they may be contested by the liquidator, or any creditor or shareholder, and that, if they are contested, objections shall be filed with the liquidator, as shall answers thereto, and that the hearing and determination of the objections shall be by the Winding-Up Court (Exhibit "A", §§87-92).
- 8. Perhaps of greatest significance on this motion is the fact that the provisions for the filing and proving of claims in the Winding-Up Court are complemented by still other provisions emphatically prohibiting the institution of or maintenance of proceedings against the company in any other court without leave of the Winding-Up Court. Thus section 21 of the Winding-Up Act provides that:

After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes. (Emphasis added.)

-- Exhibit "A", § 21

By virtue of this provision, the entry of the Winding-Up Order is intended to effect an automatic stay of all proceedings -- at least in Canada -- against the insolvent company, and thus helps to assure that all claims will be brought before the Winding-Up Court. Other provisions of the statute further promote the exclusive control of the Winding Up Court over the affairs of the insolvent by prohibiting the creation of any lien or privilege upon the property or debts of the company after its winding- p has commenced (Exhibit "A", \$ 86), and by providing that any assets in the hands of the liquidator can be obtained only on petition to the Court, and not by any "other proceeding of any kind whatever." (Exhibit "A", \$ 136).

- The policy of the United States is consistent with that of Canada. In accordance with principles of international comity, the Canadian policy should be recognized and given effect by this Court.
- 9. It should be noted that your deponent is not, by the foregoing discussion, asserting that the Canadian Winding-Up Act would by its own force have extraterritorial effect which would ipso facto preclude a non-Canadian citizen from instituting or prosecuting actions in the United States or in any other non-Canadian jurisdiction. It is, however, respectfully submitted that this Court is obligated pursuant to traditional equitable rules and the doctrine of international comity to give effect to the statutory policy of a friendly foreign jurisdiction such as Canada. This is, of course, particularly true where the policy of this country is directly consonant with the policy of the foreign jurisdiction.*

^{*} Indeed, as detailed above, the Canadian liquidation proceeding herein is the direct outgrowth of governmental level agreements involving the United States and Canada specifically calling for the commencement and control of the liquidation of IOS in its home jurisdiction, Canada. See fn., p. 3, supra.

And here there can be no doubt that the policy of the United States is in fact fully consistent with that of Canada. Indeed, the policy of centralization of all liquidation activities, as contemplated by the Canadian Winding-Up Act, is among the fundamental purposes of almost all insolvency laws and specifically is among the fundamental purposes of the United States Bankruptcy Act. Thus, for example, both the United States Bankruptcy Act and the Canadian Winding-Up Act seek to protect creditors against raids on the insolvent's assets by claimants seeking an unjustified preference. Likewise, both encourage the protection of the assets of the estate from undue expenses of administration and the protection of the courts from being made instruments either of inequity in the treatment of claimants or of the dissipation of assets belonging to the estate. To foster these purposes the United States Bankruptcy Act -- like the Canadian Winding-Up Act -- expressly provides for stays of actions against the insolvent debtor. (See, e.g., 5\$ 11a and 17b(4) of the United States Bankruptcy Act and Bankruptcy Rule 401(a); see also IOS Memorandum of Law, p. 10.)

- demonstrates, the United States courts have repeatedly recognized the desirability of centralizing liquidation proceedings in the jurisdiction of the corporate domicile of the insolvent debtor and accordingly have dismissed actions or granted stays against prosecution in jurisdictions other than the liquidation forum. (See IOS Memorandum of Law, pp. 4-9.) In this connection it is noted that such dismissals and stays have been granted whether the liquidation jurisdiction is merely a sister state or a friendly foreign country. (Ibid.)
- 11. It is further significant that such long-standing judicial practice in this country is in the process of being

specifically codified as a part of the United States Bankruptcy laws. Thus, as set forth in the IOS Memorandum of Law, the newly proposed United States Bankruptcy Act would expressly authorize a foreign liquidator to appear in a United States bankruptcy court and seek a stay of all proceedings in the United States pending against a foreign insolvent debtor. (See IOS Memorandum of Law, p. 11.) A commentary to the proposed Bankruptcy Act further notes that the Act is not intended to preclude (what is apparently recognized as existing practice) the seeking of similar relief in a non-bankruptcy court, on principles of international comity, as well. (IOS Memorandum of Law, p. 12.) That, of course, is the precise relief that is being sought by the present motion.

12. In sum, it is apparent that the continued prosecution of plaintiff's claims against IOS in this Court is wholly contrary to the policy of both the laws of the corporate domicile of IOS and the laws and judicial precedent of the United States. Only the fortuity of geography creates the possibility that this action may nonetheless go forward here unless the instant motion is granted -- i.e., if the IOS liquidation proceeding were pending in New Hampshire rather than New Brunswick, the present action would already have been automatically stayed by virtue of Rule 401(a) of the Bankruptcy Rules. Therefore to achieve a parallel result in the present situation, it is necessary for this Court to exercise its undoubted discretion and to grant the requested stay. The grant of such stay thus serves the interests of equity as well as international comity and helps to assure like recognition of United States law and policy by Canadian courts in converse situations -- i.e., suits in Canadian courts against United States bankrupts.

- D. There are other unique factual and policy considerations which justify, if not require, the grant of a stay of this action as to IOS.
- 13. Beyond the foregoing there are certain unique and compelling facts about the IOS liquidation in particular which make the application of the aforesaid policy especially desirable. Foremost among these facts is the enormously complex and vast scope of IOS' past operations. Indeed, it is notoriously well known that IOS was once one of the largest financial complexes in the world, directly or indirectly operating a multinational network of literally scores of subsidiaries in the fields of mutual fund management and sales, real estate, banking, underwriting and insurance. In recent years, however, the IOS empire suffered a monumental collapse, placing the company in a state of utter confusion and turmoil which only compounded the inherent complexity of its operations and the task now confronting its Co-Liquidators. The opinion of Mr. Justice Dickson of the Supreme Court of New Brunswick in authorizing the winding-up of IOS summarized IOS' recent pre-liquidation disaster as follows:

Trading in the stock of IOS, its funds and subsidiaries, has been suspended in all of the major stock exchanges in the world; substantial major assets, including deposits *** have been frozen in various jurisdictions; no legitimate bank in the world will *** permit IOS or its subsidiaries to maintain even a trading account; the [last] president of IOS, one Milton Meissner, has been since June [1973], incarcerated in a Luxembourg jail; * the Securities Exchange Commission [sic] of the United States has inaugurated against some forty-two defendants, including IOS and many of its principals including Vesco and LeBlanc [the predecessors of Meissnerl, a major fraud suit which is at present unconcluded before a New York court; the charter of the Untario company Transglobal, which through subsidiaries manages what is left in the various mutual funds, has been cancelled; and Vesco and LeBlanc have sought sanctuary in the Bahamas and Costa Rica.

^{*} Mr. Meissner was released on bail in March, 1974.

All of the foregoing can of course serve only to illustrate the state of complete and irrevocable disarray and impotency into which the company has fallen.

-- Exhibit "B", pp. 10-11, 17

Liquidators of IOS are proceeding to marshal the assets of the company and preserve as much as possible for all the creditors and shareholders of IOS wherever located. Obviously, even under normal circumstances a task of this magnitude would be extremely difficult. When, however, the Co-Liquidators must divert their energies and the assets of the estate to defend actions in widely diverse and scattered jurisdictions throughout the world, the task becomes impossible and prohibitively costly, all to the detriment of innocent creditors and stockholders — including even those whom the plainting herein purports to represent. It is precisely for the purpose of conserving the assets of the estate for the benefit of all bona fide creditors and shareholders that the present stay of proceedings outside the liquidation forum is sought.*

It is significant that, in striking contrast to the complexity of the task faced by the Liquidators, it appears that the assets of IOS which will eventually be available for creditors will be quite minimal. Indeed, we are advised that the IOS assets -- as distinguished from assets of numerous subsidiaries (which subsidiaries in many cases are themselves in liquidation under the control of other courts and other liquidators) -- would be totally insufficient to meet a judgment of the magnitude sought by the plaintiffs herein, even if plaintiffs were the only claimants in the liquidation proceedings -- which of course they are not. It is further of some significance that because of the dubious financial position and fluctuating circumstances which IOS has been in for the past year or more, plaintiffs in other actions against IOS and its related companies in this District have obtained voluntary suspensions of such actions. For example, the case of Halbfinger v. Bleakney, et al., 71 Civ. 3261 (M.E.L.) in which IOS' predecessor corporation, IOS, Ltd. (S.A.) Panama is a defendant has been put on the Suspense Docket of this Court pursuant to Rule 20(A) of the Rules for the Administration of the Civil and Criminal Calendars of the Southern District of New York under the Individual Assignment System. Similarly, in the case of Fogel v. Chestnutt, et al., 67 Civ. 60 (L.W.P.), also involving IOS' predecessor, the parties stipulated to the placing of the action on the Suspense Docket of this Court. At least three other actions known to be pending in the Southern District of New York involving IOS and related companies have also been placed on the Suspense Docket -- by the plaintiffs therein -- because of the liquidation of IOS.

14. It should also be noted that this is not an action involving a purely local United States creditor seeking to assert a specific claim against a specific asset of the insolvent company -- a set of circumstances which may in certain instances justify the continuation of a suit in a jurisdiction other than the liquidation forum. (See IOS Memorandum of Law, p. 16). Indeed, in the instant case there is no specific res involved nor any attachment of assets by plaintiff and the plaintiff is actually purporting to represent not local creditors but an enormous class of shareholders and former shareholders of IOS who are located primarily in jurisdictions far removed from the United States.* One of the largest block of members of plaintiffs' purported class consists of Canadian citizens. In this regard, your deponent would note that one of the three public offerings of IOS stock out of which this action grows (i.e., the so-called "Crang offering") was made wholly within Canada and only to citizens and residents of Canada. A second offering (i.e., the so-called "IOB offering") was made in substantial part to Canadian citizens, as plaintiff himself acknowledges in his complaint herein. This latter point, of course, creates the anomalous circumstance that Canadian citizens, at least those resident in Canada and clearly subject to the jurisdiction of the Canadian courts, may potentially be participating in a suit

^{*} Not only do most of plaintiff's purported class members reside in foreign countries, but they made their purchases of IOS stock in the jurisdictions of their residences pursuant to prospectuses which expressly stated that the stock was not being offered in the United States or to citizens or residents. of the United States. Accordingly, it is reasonable to conclude that such foreign purchasers anticipated that their rights against IOS, if any, would ultimately have to be asserted in IOS' corporate domicile or, at least, in some jurisdiction other than the United States.

which by reason of Section 21 of the Canadian Winding-Up Act they could not participate in if it had been instituted without prior leave in a Canadian court other than the Winding-Up Court.

- It is further highly pertinent to this motion that the very nature of the instant action insofar as it runs against IOS, an insolvent corporation now in liquidation, is not a traditional claim for money damages alone which might ordinarily be properly heard by a court of general jurisdiction, but is rather one within the special competence of a liquidation court. For the claim of plaintiff and his purported class as against IOS arises from their position as stockholders of IOS, and amounts to nothing more than an attempt -- on a theory of fraud in the inception of their purchase of stock -- to upgrade their status vis-a-vis the estate of IOS from that of stockholders to creditors. But a claim of this sort gives rise to precisely the type of issue -- i.e., the ranking and priorities among claimants against a company in liquidation -- which goes to the very heart of the function of a liquidation court and of the purpose of insolvency laws generally (see, e.g, Exhibit "A", § 71(2)). Thus, plaintiff and his class should be stayed from proceeding herein so that their claim against IOS can be disposed of in the specialized proceedings now in progress in the Winding-Up Court, and consistently with the provisions of the Winding-Up Act.
- 16. A final point justifying the request for a stay herein is that there is a substantial danger -- indeed a likelihood -- that there will in the end be a wasteful duplication and multiplicity of litigation if this action is permitted to

continue as against IOS. In this regard it is noted that since there is presently no attachment by plaintiff against any IOS assets, and since none is likely in view of the fact that IOS' assets in the United States are minimal at best, plaintiff and his class would as a practical matter ultimately have to come to the Canadian Winding-Up court to enforce any judgment obtained in this proceeding. Moreover, we are advised by Canadian counsel that the ultimate presentation in the Canadian Winding-Up Court of any claim based on a judgment resulting from this action might be subject to a substantial challenge on jurisdictional grounds and might re-open the entire question of IOS' liability, particularly if the IOS liquidators should determine that in the interests of an orderly Winding-Up they should not submit to this Court's jurisdiction by actually defending this action on its merits.* Additionally, regardless of where the merits of this action are ultimately litigated it appears that further litigation in the Canadian Winding-Up Court will be likely in light of the fact that the Winding-Up Act directs the Winding-Up Court to "determine the amount for which [any claim] shall rank" (Exhibit "A", \$ 71(2)). That provision, we are advised, will raise an exceedingly complex issue in Canada by virtue of the fact that plaintiff's purported

^{*} This conclusion is based in part on the basic principle of Canadian Winding-Up law (reflected, inter alia, in sections 5, 21 and 22 of the Winding-Up Act) that the rights of creditors are determined as of the date of presentation of the petition for a Winding-Up. Since any judgment against IOS in this action will obviously be rendered after that date, there is a serious question as to whether such a judgment will be entitled to recognition for any purpose in the Winding-Up proceeding; accordingly, a full-scale relitigation of the merits may well be necessary in the Winding-Up court. (See also IOS Memorandum of Law p. 14).

class here is made up of stockholders who are now effectively seeking a priority as judgment "creditors" by proceeding herein. It is noteworthy that this might also be the case in a United States bankruptcy proceeding. (IOS Memorandum of Law, p. 14.) As already noted above, that issue renders plaintiff's claim herein one which should peculiarly be determined by the Winding-Up court. (See ¶ 15, supra.) It is finally noteworthy that Canadian counsel has advised that to the extent that members of plaintiff's purported class do not actually participate in the present litigation they will not be affected by the results herein and will be free to proceed anew in Canada with the same claim, thereby requiring a further litigation of the issues presented in this action. In this regard, it should be noted, that Canadian counsel's position is similar to that stated by other defendants herein in connection with their attacks on the propriety of a class action herein. (See, e.g., Affidavits of John Godfray LeQuesne, sworn to September 28, 1973; Charles Jolibois and Ercole Graziadei, sworn to November 27, 1972.)

tive litigation, as outlined above, can be avoided if the stay requested herein is granted. The issues of the right to recover of the plaintiff's class and their practical ability to recover can then be determined in expeditious and equitable proceedings in Canada. Inasmuch as Canada is a country with a traditional commitment to the values of due process, there is no reason to doubt that plaintiff and his class will receive a fair hearing on their claims. In light of the obviously careful and thorough manner in which the New Brunswick court has thus far handled the IOS

liquidation proceedings, as evidenced by the various opinions and orders previously made Exhibits hereto, it is clear that plaintiff and his class will indeed receive a fair hearing.

In view of the foregoing it is respectfully submitted that no prejudice will result to the plaintiff if the requested stay is granted. Ironically, from a practical standpoint, the diversion of IOS assets and the attention and energy of the Co-Liquidators that would result from forcing them to meet diverse claims in various local situations around the world may itself be highly prejudicial to the plaintiff and his class herein.

CONCLUSION

In sum it is clear that the policies of both Canada and the United States justify and require the stay of this action as against IOS in favor of the assertion by plaintiff and his class of their claims before the Supreme Court of New Brunswick wherein the IOS Winding-Up Proceeding is pending. Moreover, given the substantial threat of duplicative litigation, the clear danger to the orderly administration of IOS' estate and the lack of prejudice to the plaintiff it is respectfully submitted that such relief is mandated herein.

Herbert M. Wachtell

Sworn to before me this

16 day of April, 1974.

Notary Public/

RUTH IVEY
Rotary Public, 3th a of New York
Mic. 03-9 3-6310
Centrich in Bronk County
Centrics that in Row York County
Commission Expires March 30, 1976

Exhibit A Annexed to Affidavit of Herbert M. Wachtell Excerpts from Winding-Up Act of Canada



CHAPTER W-10

An Act respecting the winding-up of insolvent companies

SHORT TITLE

Short title

1. This Act may be cited as the Windingup Act. R.S., c. 296, s. 1.

INTERPRETATION

Definitions

"espital stock"

2. In this Act

"capital stock" includes a capital stock de jure or de facto;

"company" .compagnie.

"company" includes a y corporation subject to this Act;

"contributory"

"contributory" means a person liable to contribute to the assets of a company under this Act; and, in all proceedings for determining the persons who are to be deemed contributories and in all proceedings prior to the final determination of such persons, it includes any person alleged to be a contributory;

"court"

"court" means

- (a) in the Province of Ontario, the Supreme Court of Ontario,
- (b) in the Province of Quebec, the Superior
- (c) in the Province of Nova Scotia, the Supreme Court,
- (d) in the Province of New Brunswick, the Supreme Court,
- (e) in the Province of Maniteba, the Court of Queen's Bench.
- (f) in the Province of British Columbia, the Supreme Court,
- (g) in the Province of Prince Edward Island, the Supreme Court,

consent of its creditors, or without satisfying their claims; or

(h) if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied until within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure. R.S., c. 296, s. 3.

Company deemed unable to pay its debts 4. A company is deemed to be unable to pay its debts as they become due whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due, has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor. R.S., c. 296, s. 4.

Commencement of winding-up 5. The winding-up of the business of a company shall be deemed to commence at the time of the service of the notice of presentation of the petition for winding up. R.S., c. 296, s. 5.

APPLICATION

Application

6. This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the former Province of Canada, or of the Province of Nova Scotia, New Brunswick, British Columbia, Prince Edward Island or Newfoundland, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incor-

porated trading companies doing business in Canada wherever incorporated and

- (a) that are insolvent; or
- (b) that are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under this Act. R.S., c. 296, s. 6.

Grain Grations 7. This Act does not apply to building societies that do not have a capital stock or to railway or telegraph companies. R.S., c. 296, s. 7.

PART I

GENERAL

Limitation of Part

Part II

8. In the case of a bank other than a savings bank the provisions of this Part are subject to the provisions of Part II. R.S., c. 296, s. 8.

Subject to Par III 9. In the case of insurance companies the provisions of this Part are subject to the provisions of Part III. R.S., c. 296, s. 9.

Winding-up Order

Cases where winding-up order may be made 10. The court may make a winding-up order,

- (a) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;
- (b) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up:
- (c) when the company is insolvent;
- (d) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital

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es ci will not likely be restored within one year;

(e) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up. R.S., c. 296, s. 10.

Application for Order

Application for winding-up order

11. The application for such winding-up order may, in the cases mentioned in paragraphs 10(a) and (b), be made by the company or by a shareholder; and in the case mentioned in paragraph 10(c), by the company or by a creditor for the sum of at least two hundred dollars, or, except in the case of banks and insurance corporations, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars par value, or holding five shares without nominal or par value in the capital stock of the company, and, in the other cases mentioned in section 10, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars par value, or holding five shares without nominal or par value in the capital stock of the company. R.S., c. 296, s. 11.

How and where

12. (1) Such application may be made by petition to the court in the province where the head office of the company is situated, or, if there is no head office in Canada, then in the province where its chief place, or one of its chief places of business is situated.

Notice of application

(2) Except in cases where such application is made by the company, four days notice of the application shall be given to the company before the making of the application. R.S., c. 296, s. 12.

Power of court

13. The court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just. R.S., c. 296, s. 13.

Proceedings may be adjourned 14. If the company opposes the application on the ground that it has not become insolvent, or that its suspension or default

was only temporary, and was not caused by a deliviency in its assets, or that the capital rack is not impaired to the extent aforesaid, or that such impairment does not endanger the capacity of the company to pay its debts in full, or that there is a probability that the lost capital will be restored within a year or within a reasonable time thereafter, and shows reasonable cause for believing that such opposition is well founded, the court, in its discretion, may, from time to time, adjourn proceedings upon such application, for a time not exceeding six months frem the date of the application, and may order an accountant or other person to inquire into the affairs of the company, and to report thereon within a period not exceeding thirty days from the date of such order. R.S., c. 296, s. 14.

15. Upon the service on the company of an order made under section 14, for an inquiry into the affairs of the company, the president, directors, officers and employees of the company and every other person, shall respectively exhibit to the accountant or other person named for the purpose of making such inquiry, the books of account of the company and all inventories, papers and vouchers referring to the business of the company or of any person therewith that are in his or their possession, custody or control, respectively; and they shall also respectively give all such information as is required by such accountant or other person as aforesaid, in order to form a just estimate of the affairs of the company. R.S., c. 296, s. 15.

16. Upon receiving the report of the accountant or person ordered to inquire into the affairs of the company, and after hearing such shareholders or creditors of the company as desire to be heard thereon, the court may either refuse the application or make the winding-up order, R.S., c. 296, s. 16.

Staying Proceedings

17. The court may, upon the application of the company, or of any creditor or entributory, at any time after the presentation of a petition for a winding-up order and before making the order, restrain further

Chap. W-10

Liquide

proceedings in any action, suit or proceeding against the company, upon such terms as the court thinks fit. R.S., c. 296, s. 17.

Court may stay winding-up proceedings 18. The court may, upon the application of any creditor or contributory, at any time after the winding-up order is made, and upon proof, to the satisfaction of the court, that all proceedings in relation to the winding-up ought the stayed, make an order staying such probable, either altogether or for a limited time, on such terms and subject to such conditions as the court thinks fit. R.S., c. 296, s. 18.

Effect of Win g-up Order

Company to

19. The company, from the time of the making of the winding-up order, shall cease to carry on its business, except in so far as is, in the opinion of the liquidator, required for the beneficial winding-up thereof; but the corporate state and all the corporate powers of the company, notwithstanding that it is otherwise provided by the Act, charter or instrument of incorporation, continue until the affairs of the company are wound up. R.S., c. 296, s. 19.

Transfer of

20. All transfers of shares, except transfers made to or with the sanction of the liquidator, under the authority of the court, and every alteration in the status of the members of the company, after the commencement of such winding-up, are void. R.S., c. 296, s. 20.

Effect of winding-up order 21. After the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company, except with the leave of the court and subject to such terms as the court imposes. R.S., c. 296, s. 21.

Execution, etc.

22. Every attachment, sequestration, distress or execution put in force against the estate or effects of the company after the making of the winding-up order is void. R.S., c. 296, s. 22.

Appointment of Liquidators

Liquidator

23. (1) The court in making the windingup order, may appeint a liquidator or more Part I

Windin

than one fiquidator of the estate and effects of the company.

Licroptey Act

(2) In the case of any company except incorporated building societies, banks, savings banks, insurance companies, trust companies, lean companies and railway companies, the court shall not appoint as liquidator any person who is not licensed as a trustee under the Bankruptcy Act. R.S., c. 296, s. 23.

li more than

24. If more than one liquidator is appointed, the court may declare whether any act to be done by a liquidator is to be done by all or any one or more of the liquidators. R.S., c. 296, s. 24.

Additional .. juidators

25. The court may, if it thinks fit, after the appointment of one or more liquidators, appoint an additional liquidator or liquidators. R.S., c. 296, s. 25.

Notice

26. No liquidator aforesaid shall be appointed unless a previous notice is given to the creditors, contributories and shareholders or members; and the court shall by order direct the manner and form in which such notice shall be given and the length of such notice. R.S., c. 296, s. 26.

Security

27. The court shall also determine what security shall be given by a liquidator on his appointment. R.S., c. 296, s. 27.

Provisional Inquidator 28. The court may on the presentation of the petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator appoint provisionally a liquidator of the estate and effects of the company and may limit and restrict hispowers by the order appointing him. R.S., c. 296, s. 28.

n mpany

29. An incorporated company may be appointed liquidator to the goods and effects of a company under this Act; and if an incorporated company is so appointed, it may act through one or more of its principal officers designated by the court. R.S., c. 296,

Inst company

30. Where under the laws of any province a trust company is accepted by the courts of

such province, and is permitted to act as administrator, assignee or curator without giving security, the trust company may be appointed liquidator of a company under this Act, without giving security. R.S., c. 296, s. 30.

Powers of

31. Upon the appointment of the liquidator all the powers of the directors cease, except in so far as the court or the liquidator sanctions the continuance of such powers. R.S., c. 296, s. 31.

Resignation and removal 32. A liquidator may resign or may be removed by the court on due cause shown, and every vacancy in the office of liquidator shall be filled by the court. R.S., c. 296, s. 32.

Powers and Duties of Liquidators

Duties after

33. The liquidator, upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled, and he shall perform such duties in reference to winding up the business of the company as are imposed by the court or by this Act. R.S. c. 296, s. 33.

Liquidator to prepare statement 34. The liquidator shall, within sixty days after his appointment, prepare a statement of the assets, debts and liabilities of the company and of the value of such assets as shown by his books and records. R.S., c. 296, s. 34.

Powers

- 35. (1) The liquidator may, with the approval of the court, and upon such previous notice to the creditors, contributories, shareholders or members as the court orders,
 - (a) bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in his own name as liquidator or in the name or on behalf of the company, as the case may be;
 - (b) carry on the business of the company so far as is necessary to the beneficial windingup of the same;
 - (c) sell the real and personal and heritable and movable property, effects and choses in action of the company, by public auction or private contract, and transfer the whole thereof to any person or company, or sell

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the same in parcels for such consideration as may be approved by the court;

(d) do all acts, and execute, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose use, when necessary, the seal of the company;

(e) prove, rank, claim and draw dividends in the matter of the bankruptcy, insolvency or sequestration of any contributory, for any sum due the company from such contributory, and take and receive dividends in respect of such sum in the matter of the bankruptcy, insolvency or sequestration, as a separate debt due from such contributory, and ratably with the other separate creditors:

(f) draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

(g) raise upon the security of the assets of the company, from time to time, any requisite sum or sums of money; and

(h) do and execute all such other things as are necessary for winding up the affairs of the company and distributing its assets.

Company liable

(2) The drawing, accepting, making or endorsing of every bill of exchange or promissory note, as mentioned in subsection (1), on behalf of the company, has the same effect, with respect to the liability of such company, as if such bill or note had been drawn, accepted, made or endorsed by or on behalf of such company in the course of the carrying on of its business.

No delivery of

(3) No delivery of the whole or of any part of the assets of the company is necessary to give a lien to any person taking security as aforesaid upon the assets of the company. R.S., c. 296, s. 35.

Appointment of

36. The liquidator may, with the approval of the court, appoint a solicitor or law agent to assist him in the performance of his duties. R.S., c. 296, s. 36.

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37. (1) The liquidator may, with the approval of the court, compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims,

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demands and matters in dispute in any way relating to or affecting the assets of the company or the winding-up of the company, upon the receipt of such sums, payable at such times, and generally upon such terms, as are agreed upon.

Security may be taken (2) The liquidator may take any security for the discharge of such calls, debts, liabilities, claims, demands, or disputed matters, and give a complete discharge in respect of all or any such calls, debts, liabilities, claims, demands, or matters. R.S., c. 296, s. 37.

Creditors may be compromised 38. The liquidator may, with the approval of the court, make such compromise or other arrangements with creditors or persons claiming to be creditors of the company as he deems expedient. R.S., c. 296, s. 38.

Court may provide as to powers 39. The court may provide, by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by this Act, without the sanction or intervention of the court. R.S., c. 296, s. 39.

Documents to Dominion Statistician

- 40. The liquidator shall promptly after their receipt or preparation, mail to the Dominion Statistician, Dominion Bureau of Statistics, Ottawa, a true copy of
 - (a) the winding-up order referred to in section 10;
 - (b) the petition referred to in section 12;
 - (c) the statement of the debts, liabilities and assets of the company and statements of the value of such assets referred to in section 34; and
 - (d) the dividend sheets referred to in section 85. R.S., c. 296, s. 40.

Appointment of Inspectors

Inspectors

41. The court may appoint, at any time when found advisable, one or more inspectors, whose duty it is to assist and advise the liquidator in the liquidation of the company. R.S., c. 296, s. 41.

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Chairman of

67. In directing meetings of creditors, contributories, shareholders or members of the company to be held as provided in this Act, the court may either appoint a person to act as chairman of such meeting, or direct that a chairman be appointed by the persons entitled to be present at such meeting; and, in case the appointed chairman fails to attend the meeting, the persons present at the meeting may elect a chairman qualified who shall perform the duties prescribed by this Act. R.S., c. 296, s. 67.

Voting to be in person or by proxy 68. No contributory, creditor, shareholder, or member shall vote at any meeting unless present personally or represented by some person acting under a written authority, filed with the chairman or liquidator, to act as such representative at the meeting, or generally. R.S., c. 296, s. 68.

Production of Pass-books

Bank book of liquidator 69. At every meeting of the contributories, creditors, shareholders or members, the liquidator shall produce a bank pass-book, showing the amount of the deposits made for the company, the dates at which such deposits were made, the amount withdrawn and dates of such withdrawal. R.S., c. 296, s. 69.

Other times

70. The liquidator shall also produce such pass-book whenever ordered to do so by the court. R.S., c. 296, s. 70.

Creditors' Claims

What debts may be proved 71. (1) When the business of a company is being wound up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, and for liquidated or unliquidated damages, are admissible to proof against the company.

Uncertain claims

(2) In case of any claim subject to any contingency or for unliquidated damages or which for any other reason does not bear a certain value, the court shall determine the

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value of such claim and the amount for which it shall rank. R.S., c. 296, s. 71.

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- 72. Clerks or other persons in, or having been in the employment of the company, in or about its business or trade, shall be collocated in the dividend sheet by special privilege over other creditors, for any arrears of salary or wages due and unpaid to them at the time of the making of the winding-up order, not exceeding the arrears that have accrued to them during the three months immediately preceding the date of such order. R.S., c. 296, s. 72.
- 73. The law of set-off, as administered by the courts, whether of law or equity, applies to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act. R.S., c. 296, s. 73.
- 74. The court may fix a certain day or certain days on or within which creditors of the company may send in their claims, and may direct notice thereof to be given by the liquidator, and determine the manner in which notice of the day or days so fixed shall be given by the liquidator to the creditors. R.S., c. 296, s. 74.
- 75. (1) The liquidator may give notice in writing to creditors who have sent in their claims to him, or of whose claims he has notice, and whose claims he considers should not be allowed without proof, requiring such creditors to attend before the court on a day to be named in such notice and prove their claims to the satisfaction of the court.
- (2) In case any creditor does not attend in pursuance of such notice his claim shall be disallowed, unless the court sees fit to grant further time for the proof thereof.
- (3) If any creditor attends in pursuance of such notice, the court may on hearing the

matter allow or disallow the claim of such creditor in whole or in part. R.S., c. 296, s. 75.

Distribution of

76. (1) After the notices required by sections 74 and 75 have been given, and the respective times therein specified have expired, and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part thereof among the persons entitled thereto and without reference to any claim against the company that has not then been sent to the liquidator.

Claims not sent

(2) The liquidator is not liable to any person whose claim has not been sent in at the time of distributing such assets or part thereof for the assets or part thereof so distributed. R.S., c. 296, s. 76.

Rank of claims sent in after distribution started 77. In case any claim or claims are sent in to the liquidator after any partial distribution of the assets of the company, such claim or claims, subject to proof and allowance as required by this Act, shall rank with other claims of creditors in any future distribution of assets of the company. R.S., c. 296, s. 77.

Secured Claims

Duty of creditor holding security 78. If a creditor holds security upon the estate of the company, he shall specify the nature and amount of such security in his claim, and shall therein, on his oath, put a specified value thereon. R.S., c. 296, s. 78.

Option of liquidator

79. The liquidator, under the authority of the court, may either consent to the retention by the creditor of the property and effects constituting such security or on which it attaches, at such specified value, or he may require from such creditor an assignment and delivery of such security, property and effects, at such specified value, to be paid by him out of the estate so soon as he has realized such security, together with interest on such value from the date of filing the claim until payment, R.S., c. 296, s. 79.

Ranking of secured creditor

80. In case of such retention, the difference

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(c) upon his paying them the value by them placed thereon; or
(d) upon his securing the estate of the company to the satisfaction of the liquidator against any claim by reason of such subsequent mortgages, judgments, executions, hypothecs and liens. R.S., c. 296, s. 83.

Authority to

84. Upon a secured claim being filed, with a valuation of the security, the liquidator shall procure the authority of the court to consent to the retention of the security by the creditor, or shall require from him an assignment and delivery thereof. R.S., c. 296, s. 84.

Dividend Sheet

Preparing dividend sheet 85. In the preparation of the dividend sheet, due regard shall be had to the rank and privilege of every creditor, but no dividend shall be allotted or paid to any creditor holding security upon the estate of the company for his claim until the amount for which he may rank as a creditor upon the estate, as to dividends therefrom, is established as herein provided. R.S., c. 296, s. 85.

Liens

No lien by execution, etc., after commencement of winding up

- 86. (1) No lien or privilege shall be created (a) upon the real or personal property of the company, for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the sheriff of any writ of execution, or by levying upon or seizing under such writ the effects or estate of the company; or
- (b) upon the real or personal property of the company, or upon any debts due or accruing or becoming due to the company, by the filing or registering of any memorial or minute of judgment, or by the issue or taking out of any attachment or garnishee order or other process or proceeding;
- if, before the payment over to the plaintiff of the moneys actually levied, paid or received under such writ, memorial, minute, attachment, garnishee order or other process or proceeding, the winding-up of the business of the company has commenced.

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la satisfaction du la compagnie contre ison de ces hypothèctions et privilèges . art. 83.

mation garantie est Autorisation de ion de la garantie, retenir : de la cour l'autorire que le créancier doit exiger de lui remise. S.R., c. 296,

Lividende

on du bordereau des Préparation du enu bon compte du dividendes aque créancier; mais re attribué ni payé à amation est garantie cagnie, avant que le eut être colloqué, en ar l'actif, dans la es, ait été établi ainsi ate loi. S.R., c. 296,

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ze n'est créé es ou immeubles de pas privilège montant d'une dette une fois la rement ou pour les commencée at, par l'émission ou i'un bref d'exécution, viens et effets de la - ce bref; ou

es ou immeubles de aucune de ses dettes sie d'échéance, par le ment d'une note ou Li par l'émission d'un u d'arrêt en mains re exploit, ni par - procedure ;

rires de la compagnie emise au demandeur ot prélevés, payés ou ·f d'exécution, de la ment, du brei d'arrêt ains tierces ou autre

Les exécutions. etc., n'emportent Lien for costs excepted

(2) This se tion does not affect any lien or privilege for costs that the plaintiff possesses under the law of the province in which such writ, attachment, garnishee order or other process or proceeding was issued or taken out. R.S., c. 296, s. 86.

Contestation of Claims

Claims or dividend may be objected to

87. Any liquidator, creditor or contributory, or shareholder or member may object to any claim filed with the liquidator, or to any dividend declared. R.S., c. 296, s. 87.

Objections in writing

88. (1) Where a claim or dividend is objected to, the objections shall be filed in writing with the liquidator, together with the evidence of the previous service of a copy thereof on the claimant.

Answers and replies

(2) The claimant shall have six days to answer the objections, or such further time as the court allows, and the contestant shall have three days to reply, or such further time as the court allows. R.S., c. 296, s. 88.

Day to be fixed for hearing

89. Upon the completion of the issues upon the objections, the liquidator shall transmit to the court all necessary papers relating to the contestation, and the court shall then, on the application of either party, fix a day for taking evidence upon the contestation, and hearing and determining the same. R.S., c. 296, s. 89.

Costs

90. The court may make such order as seems proper in respect to the payment of the costs of the contestation by either party or out of the estate of the company. R.S., c. 296,

Default in answer by claimant

91. Where, after a claim or dividend has been duly objected to, the claimant does not answer the objections, the court may, on the application of the contestant, make an order barring the claim or correcting the dividend, or may make such other order in reference therete as appears right. R.S., c. 296, s. 91.

Security for CITALA

92. The court may order the person objecting to a claim or dividend to give security for costs of the contestation within a limited time, and may, in default, dismiss the contestation or stay proceedings thereon, upon such terms as the court thinks just. R.S., c. 296, s. 92.

Distribution of Assets

Distribution of

93. The property of the company shall be applied in satisfaction of its debts and liabilities, and the charges, costs and expenses incurred in winding up its affairs. R.S., c. 296, s. 93.

Winding-up

94. All costs, charges and expenses properly incurred in the winding-up of a company, including the remuneration of the liquidator, are payable out of the assets of the company, in priority to all other claims. R.S., c. 296, s. 94.

Distribution of surplus

95. The court shall distribute among the persons entitled thereto any surplus that remains after satisfaction of the debts and liabilities of the company, and the winding-up marges, costs and expenses, and unless otherwise provided by law or by the Act, charter or instrument of incorporation, any property or assets remaining after such satisfaction shall be distributed among the members or shareholders according to their rights and interests in the company. R.S., c. 296, s. 95.

Fraudulent Preferences

Gratuitous

96. All gratuitous contracts, or conveyances or contracts without consideration, or with a merely nominal consideration, respecting either real or personal property, made by a company in respect to which a winding-up order under this Act is afterwards made, with or to any person whatsoever, whether creditor of the company or not, within three months immediately preceding the commencement of the winding-up, or at any time afterwards, shall be presumed to have been made with intent to defraud the creditors of such company, R.S., c. 296, s. 96.

Centracts injuring or obstructing creditors 97. All contracts by which creditors are injured, obstructed or delayed, made by a company unable to meet its engagements, and in respect to which a winding-up order

Partie I

Part I -

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R.S., c. 296, s. 133.

Solicitors and counsel representing classes of creditors

134. (1) The court if satisfied that, with respect to the whole or any portion of the proceedings, the interests of creditors, claimants or shareholders can be classified, may, after notice by advertisement or otherwise, nominate and appoint a solicitor and counsel to represent each or any class for the purpose of the proceedings, and all the persons composing any such class are bound by the acts of the solicitor and counsel so appointed, and service upon such solicitor of notices, orders, or other proceedings of which service is required, shall for all purposes be, and be deemed to be, good and sufficient service thereof upon all the persons composing the class represented by him.

Règles quant aux amendements

Procédure sur

ordonnance

c'une autre cour

Costs

(2) The court may, by the order appointing a solicitor and counsel for any class, or by subsequent order, provide for the payment of the costs of such solicitor and counsel by the liquidator of the company out of the assets of the company, or out of such portion thereof as to the court seems just and proper. R.S., c. 296, s. 134.

Vices de forme

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Liquidator subject to summary jurisdiction of court 135. The liquidator is subject to the summary jurisdiction of the court in the same manner and to the same extent as the ordinary officers of the court are subject to its jurisdiction; and the performance of his duties may be compelled by order of the court. R.S., c. 296, s. 135.

es pouvoirs conférés sont complémentaires Remedies obtained by summary order 136. All remedies sought or demanded for enforcing any claim for a debt, privilege, mortgage, lien or right of property upon, in or to any effects or property in the hands, possession or custody of a liquidator, may be obtained by an order of the court on summary petition, and not by any action, suit, attachment, scieure or other proceeding of any kind whatever. R.S., c. 296, s. 136.

Rules, Regulations and Forms

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Judges may make 137. (1) A majority of the judges of the court, of which the chief justice shall be one, may, from time to time, make, frame and settle the forms, rules and regulations to be followed and observed in proceedings under

Exhibit B Annexed to Affidavit of Herbert M. Wachtell

Opinion of Hon. Dickson, J., Dated November 5, 1973

IN THE SUPREME COURT OF NEW BRUNSWICK

IN THE MATTER OF I.O.S. LTD,

-and-

IN THE MATTER of three several applications to wind up the said company under the Winding-up Act, Revised Statutes of Canada 1970, Chapter W-10

Applications heard in Chambers at the City of Fredericton on August 30, 1973 and on September 13th, October 15 th - 19th, 22nd, 23rd, 25th and 31st.

Appearances: David T. Hashey, Esq., Harry K. Scott, Esq. and H. Bernard Mayer, Esq., Q.C. (of the Ontario Sar) for the applicants the Public Trustee of Ontario, Montreal Trust Company and Peter Wood

> William Tindale, Esq., Q.C. and David O'Srien, Esq. (of the Quebec Bar), assisting re Montreal Trust Company application

William L. Woyt, Esq., Q.C., E. J. Mocklar, Esq. and G. Keith Allen, Esq., for I.O.S. LTD.

Dickson, J (orally)

These are three several applications made under the Winding-up Act R.S.C. 1970, Ch. W-10 for a wirfing-up order in respect of I.O.S. Ltd (herein called "IOS"), a company incorporated by Letters Patent issued on January 28, 1953 under the Canadian Corporations Act under the original name Dalmar Ltd but whose name was subsequently changed by supplementary Letters Patant issued on April 28, 1959 to I.O.S. Holdings Ltd and again by supplementary Letters Patent issued on June 27, 1969 to the present name. The powers originally granted to the company extended generally to the power to carry on business as an investment and holding company but these powers were subsequently extended in ways which are not here significant. The original authorized capital stock of the company was \$50,000. This was increased in April 1969 to \$20 million, in June 1969 to \$40 million and in September 1969 to \$56.25 million (now for the first time expressed in U.S. currency). At the present time

75 million shares styled preferred and 150 million shares styled common are authorized, each with a par value of 25¢ U.S.

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The operations of the company have been carried on almost in their entirety outside of Canada but its head office has since October 1969 been situated within this Province at the City of Saint John, by virtue of which fact the applications have come before this Court. The head office has been a nominal one only with the premises and address of a firm of solicitors designated for such purpose. The administrative offices of the company and its chief places of business have been maintained at Geneva in Switzerland and at Ferney-Voltaire in France, the latter place being only a few minutes distant from Geneva.

The first application to come before me, that of the Crown in right of the Province of Ontario as represented by the Public Trustee of that Province, was initially heard on August 30th. That application, which is founded on the alleged insolvency of the company, has been brought by the Public Trustee in his quality as a creditor of IOS by virtue of the vesting in the Crown in right of Ontario of the assets of Transglobal Financial Services Limited (herein called "Transglobal"), an Ontario company whose stock is approximately 79.5% owned by IOS, consequent on the cancellation of the charter of that company ca July 30, 1973 by the Minister of Consumer and Commercial Relations of the Province of Ontario under the Ontario Business Corporations Act, which assets, as it is alleged, include a debt of some \$2.248 million owed to Transglobal by IOS. At the initial hearing counsel for the company, who throughout these proceedings are in effect counsel for a dominant shareholder of IOS, namely, Kilmorey Investments Ltd (herein called "Kilmorey"), requested further time to prepare an answer and the hearing of the application was adjourned to September 13th, an interim order however

Jean Romeo Lajoic, of the City of Ottawa, a licensed trustee under the Bankruptcy Act and an employee of the Canada Department of Consumer and Corporate Affairs, as provisional or interim liquidator of the estate and effects of IOS until the hearing of the application or until further order. By that order the provisional liquidator was empowered generally to take possession of and protect the assets of the company on an interim basis and to employ for such purpose as his agent The Clarkson Company Limited, an Ontario firm with expertise in accounting and liquidations. The appointment of the interim liquidator has been continued to this time.

At the adjourned hearing on September 13th a second application, that of Montreal Trust Company, a Montreal-based company which has acted as transfer agent for IOS, was presented, also seeking a winding-up order in respect of IOS. This applicant has petitioned by virtue of being a creditor of the company in respect of a debt of some \$12,000 claimed to be owing as stock transfer fees. Again the application was founded on the alleged insolvency of the company within the meaning of the Winding-up Act. The hearing of this application and further consideration of the first application was then adjourned at the request of counsel to October 15th.

On the resumption of the hearings on that date a third application for a winding-up order, that of one Peter Wood, a shareholder of the company, was concurrently presented to me and by agreement of counsel all three applications were heard conjointly over the next fortnight, it being the understanding that all evidence adduced should be considered pertinent, in so far as relevant, to all applications. At the outset of the hearing counsel for the company indicated their intention of disputing as questions of law the status of the public Trustee

to apply for the relief he seeks under the Act and also, by reason of a tender having been made immediately prior to the hearing to Montreal Trust Company of the amount claimed by that company as a creditor, the status of that company to apply for a winding-up order. Inasmuch as the third application, that of Mr. Wood, embraced the grounds not only of the company's insolvency but also the wider grounds of impairment. of capital and the propriety of making in order on just and equitable grounds, it was agreed that an the termination of the hearing argument should be confined initially to the issues involved in the third application and that that application should first be considered and disposed of by the Court, with argument and consideration of the first two applications to proceed only should the third application not be granted. It is for that reason that I deal herein only with the last application to come before me.

It may here be appropriate to set out those provisions of the Winding-up Act which are principally relev nt. Section 6 provides:

Sec.6 Application- This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the former Province of Canada, or of the Province of Nova Scotia, New Brunswick, British Columbia, Prince Edward Island or Newfoundland, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wherever incorporated and

- (a) that are insolvent; or
- (b) that are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under the provisions of this Act.

Sections 10 and 11 provide (and I omit the irrelevant parts):

Sec. 10. Cases where winding-up order may be made. The court may make a winding-up order,

⁽a)

⁽h)

- (c) when the company is insolvent;
- (d) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or
- (e) when the court is of opinion that for any other reason it is just and equitable that the company be wound up.

Sec. 11. Application for winding-up order. The application for such winding-up order may... be made... in the case mentioned in paragraph 10(c), by the company or by a creditor for the sum of at least two hundred dollars, or... by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars par value, or holding five shares without nominal or par value in the capital stock of the company, and, in the other cases mentioned in section 10, by a shareholder holding shares in the capital stock of the company to the amount of at least five hundred dollars par value, or holding five shares without nominal or par value in the capital stock of the company.

Sections 3 and 4 provide:

- Sec. 3. When company deemed insolvent. A company is deemed insolvent
- (a) if it is unable to pay its debts as they become due;
- (b) if it calls a meeting of its creditors for the purpose of compounding with them;
- (c) if it exhibits a statement showing its inability to meet its liabilities;
- (d) if it has otherwise acknowledged its insolvency;
- (e) if it assigns, removes or disposes of, or attempts or is about to assign, remove or dispose of, any of its property, with intent to defraud, defeat or delay its creditors, or any of them;
- (f) if, with such intent, it has procured its money, goods, chattels, land or property to be seized, levied on or taken, under or by any process of execution;
- (g) if it has made any general conveyance or assignment of its property for the benefit of its creditors, or if, being unable to meet its liabilities in full, it makes any sale or conveyance of the whole or the main part of its stock in trade or assets, without the consent of its creditors, or without satisfying their claims; or
- (h) if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied until within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure.

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Sec. 4. Company deemed/to pay its debts. A company isdeemed to be unable to pay its debts as they become due whenever a creditor, to whom the company is indebted in a sum exceeding two hundred dollars then due has served on the company, in the manner in which process may legally be served on it in the place where service is made, a demand in writing, requiring the company to pay the sum so due, and the company has, for ninety days, in the case of a bank, and for sixty days in all other cases, next succeeding the service of the demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor.

It has been established by the evidence that the applicant Wood is in fact the holder of 2,397 preferred shares in the capital stock of the company, the aggregate par value thereof being \$599.25 in U.S. currency and the Canadian dollar equivalent at the current rate of exchange being \$602.73. He has therefore by virtue of S. 11 the status to apply for a winding-up under any of the cases mentioned in S. 10.

It may here be appropriate to deal with one of the defences raised by counsel for the company touching upon the question of jurisdiction. It has been by them contended that by virtue of the precise wording of S.6 the Act can have application only to a company incorporated in Canada "the affairs whereof are subject to the legislative authority of the Parliament of Canada" or to certain other types of companies, including "trading companies doing business in Canada wherever incorporated" - among which IOS should perhaps not be included - but which must in any event either be proven insolvent or already in liquidation or in the process of being wound up. Without elaborating upon their argument further I dismissed this contention summarily. It is in my view perfectly obvious from a reading of S. 6 that three classifications of companies come within the ambit of the Act: firstly, all corporations, without limitation, incorporated by or under the authority of an Act of the Parliament of Canada; secondly, all "pre-Confederation " incorporated companies whose "incorporation and affairs" have since their incorporation become subject to the logiclative authority of the Parliament of Canada; and thirdly, certain types of company which, while incorporated outsile Canada, are doing business in Canada and are insolvent or in liquidation or in the process of being wound up. IOS clearly falls within the first category.

I do not propose in these reasons to set out other than a brief summary of the operations of the respondent company, and of its management, and of certain events which have occurred in its recent past, for never could it be more apparent that a winding-up order should be made under the just and equitable principle incorporated in clause (e) of S.10. The notoriety obtained by the company and the widespread publicity given in the world press and other media to certain of the dealings of those concerned with its management over the past several years indeed creates some difficulty in differentiating between knowledge which comes from those sources and that which comes from the extensive evidence adduced at the hearing. But it is with recent events affecting the company that we are herein essentially concerned. The principal issue is of course whether in all the circumstances presently existing this Court should hold to the opinion that it is just and equitable that the company be wound up.

The words "just and equitable" as used within the context of the Act have been the subject of judicial consideration and comment on many occasions. As stated by Neville, J in Re Bleriot Mfg Aircraft Co..Ltd (1916) 32 T.L.R. 253 at page 255, and referred to more recently with approval by Hartt, J in Re R. J. Jowsey Mining Co. Ltd 1969 1 O.R. 437;

The words "just and equitable" are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact and each case must depend on its own circumstances.

The "just and equitable" rule was further expounded upon by Lord Shaw of Dunfermline in delivering the speech of the Privy Council in Loch v. John Plackwood Ltd 1924 A.C. 783 at page 783, quoted with approval by Jessup, JA of the Ontario Court of Appeal in

an appeal in the Jowsey Mining case (reported 1969 2 O.R. 549 at page 559), where he spoke thus:

It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the comestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

In my view the just and equitable principle is appropriately applicable under the Act in even somewhat broader circumstances than those which have been alluded to in most of the cases where it has in fact been applied. In most of those, by virtue of the circumstances, consideration has been largely confined to the degree to which shareholders and creditors may be harmed by the mismanagement of directors. It appears to me to be of equal importance, in the appropriate case, to consider the likelihood of harm to others who may in future be induced to deal with a company should its operations be continued, or alternatively that situation where the affairs of a company, through maintenance of offshore operations and the use of a multitude of multinational sub_sidiaries and interlinked companies have become so complex and obscure as to render it virtually incapable of any type of effective jurisdictional control, or alternatively to that situation whem the reputation of a company so operating has become through the nature of its corporate conduct and that of its management so sullied that it brings into disrepute the reputation and good name of the jurisdiction within which it was created, to the very great detriment of other legitimate business undertakings sponsored by the same jurisdiction. I point out that, while in the instant case it would not be inappropriate to recog- . nize this enlarged concept of the just and equitable principle, it is not strictly necessary, for in my view the application of that principle is surficiently justifiable even under the strictures imposed by the precedents. In any event the situations

I have referred to are probably of academic interest only because for practical purposes where they might arise they would undoubtedly be accompanied by a lack of confidence grounded on a lack of probity.

I now turn to a brief review of the operations of this particular company and to a resume of some of the events in its immediate past. During the late fifties one Bernard Cornfeld established in Europe a business undertaking known as Investors Overseas Services involving the sale to investors around the world of shares in a mutual investment fund program. Management of the undertaking was in due course transferred to a Panamanian-registered company known as I.O.S. Ltd (s.a.) and subsequently, in 1969, to the Canadian company I.O.S. which is the subject of these proceedings. With the capitalization of the company increased to its present level a large scale underwriting of the sale of its stock was carried out in 1969 or 1970. About that time the company had grown into one of the largest financial services complexes in the world, with a network of dozens of subsidiaries inc_orporated variously throughout most of the countries of Europe and Central and North America. Its operations had become extended to the fields of real estate, banking and insurance, with assets reaching into many millions of dollars. Annual sales amounted to billions; the total number of clients approached the million mark; and the company and its subsidiaries held upwards of \$2 billion under management in the mutual funds. A financial crisis evolving from a shortage of cash brought about the loss of control of this financial empire by Cornfeld to one Robert Lee Vesco who entered the picture in early 1971. The principal mutual funds then in operation comprised four funds known as "Dollar Funds" with aggregate assets of about a billion dollars and upwards of a quarter of a million fundholders. These funds were Fund of Funds Ltd, IIT (International Investment Trast), Venture Fund (International) NV, and Transglobal Fund Ltd.

In mid-1971 Vesco brought into the IOS complex as a senior financial adviser one Norman LeBlanc, who had some familiarity with its operation through employment with Coopers & Lybrand, an international firm of chartered accountants which in June 1971 were engaged as auditors for IOS. LeBlanc has since - largely, it would appear, through funds and assets spun off from the IOS complex - established somewhat of a financial empire of his own based in the Bahamas and Costa Rica which areas have lately also become the center for Vesco's continuing operations.

The IOS complex at this time comprised upwards of seventyfive subsidiaries or closely associated companies incorporated in such far-flung jurisdictions as Panama, the United States, Luxemburg, the Bahamas, Great Britain, France, Italy, Switzerland, Germany, Austria, Canada, the Netherlands Antilles, and Israel. For some time the apparent inability of the security and corporate regulatory bodies in the various jurisdictions concerned to regulate adequately or even at all the operations of the complex had become a matter of increasing concern to the governments of many countries and suspicions mounted as to the legitimacy of many financial transactions carried out within the complex, and between its principals, and by its principals with others. The evidence on this application treated only in a general way with the circumstances leading to these suspicions and I do not here find it necessary to deal further with them in any detail. Suffice it to say that some of the main consequences have been that trading in the stock of IOS, its funds and subsidiaries, has been suspended in all of the major stock exchanges in the world; substantial major assets, including bank deposits of funds in the mutual fund program, have been frozen in various jurisdictions; no legitimate bank in the world will now permit IOS or its sub_sidiaries to maintain even a trading account; the present President of IOS, one Milton Meissner, has been since June last

incarcerated in a Luxemburg jail; the Securities Exchange
Commission of the United States has inaugurated against some
forty-two defendants, including IOS and many of its principals
including Vesco and LeBlanc, a major fraud suit which is at
present unconcluded before a New York court; The charter of
the Ontario company Transglobal, which through sub_sidiaries
manages what is left in the various mutual funds, has been cancelled; and Vesco and LeBlanc have sought sanctuary in the
Bahamas and Costa Rica. As to the last it is possibly fair to
note that the sanctuary found is probably dependent upon maintenance of the favour of the local regimes and could well be
of snort-lived endurance.

In April 1972 Vesco, in the throes of mounting pressure for criminal prosecution, ostensibly severed his connection with the company although he, along with LeBlanc, continued for some time thereafter openly as a "consultant". At that time he resigned as chairman and his control of IOS, exercised through International Controls Corporation, a New Jersey company, was sold - or at least transferred - to a Bahamian company Kilmorey Investments Limited of Nassau, which was ostensibly owned by LeBlanc, Meissner and two others of little account, one Ulrich J. Strickler and one Graze. LeBlanc shortly thereafter transferred, possibly through Strickler, his interest to Meissner who fell into the principal control of IOS and became, as he has remained until now, its President. The evidence of his fellow directors is that in fact - at least prior to his arrest - he was customarily given to use of the self-appointed title "Supremo".

By the time Meissner, Vesco and LeBlanc had finished with the company it was but a shadow of its former self. Many of the hard assets had been spun off into corporations serving interests other than those of the shareholders of IOS. Sizable portions of the mutual funds had been used for questionable purposes and the value of the assets in the funds had depreciated very considerably. Unfavourable publicity afforded the company, the threat of action by various regulatory bodies, the defection of a large and sophisticated sales force, and general loss of confidence

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in the motives of the company and its controls had largely reduced the company's business to that of management, if not mismanagement, of its surviving assets. It was in these circumstances that Meissner, the President, arranged sale of the dominant interest: of Kilmorey to a group of Spanish businessmen in the latter part of 1972. Further reference is made hereunder to this transaction. Perhaps largely to preserve the existence of a corporate raison d'être efforts were made by management early in 1973 to placate the regulatory bodies, and in particular the banking commission of Luxemburg, by reconstituting, consolidating and preserving the remaining assets of the mutual funds under the control of the regulatory authority. The plan envisaged provision for redemption of some portion of the investments by fundholders over a period of time. The scheme was to be considered at what came to be referred to as a "summit meeting" scheduled for Luxemburg in late June last between representatives of the company and of numerous regulatory bodies and of certain associations formed by the fundholders.

But it is necessary, in order to appreciate events to go back a short distance in time. In October 1971 Meissner had contacted in London an acquaintance, one George Roberts, a company director with widespread business connections and with whom he had had dealings some years before. Meissner represented to Roberts that he and Vesco controlled IOS and asked him to represent the interests of IOS on the board of ILI (UK) Ltd, a United Kingdom insurance subsidiary of IOS whose assets represented substantially all of the assets of IOS in Britain. Roberts acceded to the request and took his place on the board and also in due course on the boards of various other IOS subsidiaries. The intention at that time - which has since been carried out, although under circumstances which has led to great suspicion was to sell the stock in TLT (UK) to a prospective London purchaser. In May 1972 prospects of completion of the transaction appeared good. Walnut r then advised Poberts of the passing of

control of IOS to Kilmorey and represented that he and Strickler were the sole shareholders of the latter company. He further acquainted him with the intention of disposing of control to undisclosed purchasers and to have a caretaker board operate in the interim. Roberts accepted an invitation to sit on the caretaker board, which was to be reduced in size to nine members from the then figure of twenty-seven. At an extraordinary general meeting of shareholders held in conjunction with the annual meeting of shareholders on June 30, 1972 - which incidentally has been the last meeting of shareholders held - the board was reduced in size and Roberts was elected among the directors. Between that time and October 29th, when the sale to the Spaniards was, at least, temporarily consummated, no meetings of the board were held. On the latter date the board resigned, Kilmorey passed to the Spaniards, and the latter group formed a new board.

But this arrangement was not to remain in being for long. On November 27th the American SEC commenced its fraud suit involving all of the former principals of IOS and in which it alleged the misappropriation of some \$225 million in assets of the company and its Dollar Funds. The following day Meissner called Roberts from Costa Rica and advised him that the Spanish transaction was to be reversed and urging his assistance and that of a London business associate one Shepard, in the formation of a new board to "save the company". In apparent good faith even if perhaps is not in good judgment - Roberts and Shepard acceded to the request, subject to certain conditions which they imposed on Meissner. A new board, filling only six of the nine vacancies, was composed, consisting of the two Londoners together with Meissner, Strickler and two Costa Ricans. The latter two were acknowledged to be only people of straw. They were in fact able to converse with their fellow directors - if indeed they ever did so at all - only through the medium of an interpreter.

Roberts and Shepard had received tentative assurances from Meissner concerning his ability to answer SEC allegations but they were particularly concerned over one transaction involving the transfer to Costa Rica of \$60 million from the assets of one of the mutual funds. Meissner undertook to regularize that transaction but it was the evidence of Roberts at the hearing that this was in fact never done.

The principal condition imposed by Roberts and Shepard was that the board was to be an effective board and that its number was to be limited to six thus according to them the privilege, in effect, of exercising a veto power by withholding a quorum should they consider that necessary. In the meantime Coopers & Lybrand had resigned as auditors. During their service they had prepared a financial statement for the company for the year ending December 31, 1971, the last complete financial statement produced at all by the company, and to which the auditors found they were unable to affix the usual auditor's certificate.

Roberts then busied himself in endeavouring - unsuccessfully to engage new auditors and, more importantly, in negotiating in
early 1973 with the banking authorities of Luxemburg in regard
to accounting for the fund assets under a proposal known as the
"European plan". It is perhaps significant to note that at a
board meeting on December 17, 1972 two of the three vacancies on
the board had been filled, contrary to the undertaking of Meissner,
through the appointment of two further Costa Ricans, which action
disturbed the balance of power within the board and evoked appropriate protest by the two London directors.

On April 7, 1972 a directors meeting was held at which
Meissier, Shepard, Roberts and Strickler were constituted an
executive management committee and the matter of furthering the
gaining of acceptance of the so-called European plan was considered...

The plan was to come before the summit meeting scheduled for Luxemburg in late June but when Meissner and the others attended them the regulatory bodies moved by deciding upon liquidation of the Dollar Funds, and the Luxemburg authorities more particularly by arresting Meissner and impounding him in the Duchy of Luxemburg prison where he still remains. This precipitate action in effect spelt the end for IOS as a functional business organization and the events which followed serve only to illustrate the realism with which most of the principals involved faced this fact.

On July 4th a directors meeting was held at Nassau. Apart from Strickler the only directors present were the non-Englishspeaking Costa Ricans. Roberts and Shepard refused to be involved so soon after the arrest of Meissner. At this meeting Strickler was appointed to act on behalf of all directors in dealing with the affairs of the company. On July 12th the directors met again, this time with Roberts and Shepard present together with Strickler and three of the Costa Ricans, and as well a number of lawyers and company officers. It was then resolved at the instance of Shepard and Roberts that, in effect, preliminary consideration be given to the advisability of putting IOS and its chief subsidiary Transglobal into liquidation and also that avenues be explored for the liquidation of the mutual funds. On July 30th the charter of Transglobal was cancelled, as alluded to earlier, and the Clarkson Company, as agent for the Public Trustee of Ontario, secured at Geneva and Ferney Voltaire, with the assistance of several of the company officers, certain invaluable records pertaining to ownership of the mutual funds.

On August 2nd the board of IOS, with only Meissner and one of the Costa Ricans absent, met again at Nassau. At this meeting,

attended also by senior legal counsel for the company, a financial report prepared by the Treasurer of the company, Mr. Edward Whitcraft, was presented and discussed. This report indicated that IOS had been insolvent as of December 31, 1972 to the extent of \$7.8 million and estimated the deficit as of June 30, 1973 to be in excess of \$9 million. The company was then entirely reliant for funds on borrowings from its subsidiaries. Transglobal, from whom it had borrowed \$200,000 for operating expenses in July alone, had now dried up as a source of funds and the report forecast that the company would have a nil cas position at the end of August. The Treasurer stated as his opinion that the company was insolvent and unable to meet its ongoing liabilities and recommended that it should therefore commence bankruptcy proceedings. A resolution was then adopted unanimously by all directors present providing that its Montreal counsel "be directed to take a'l necessary and proper steps to enlist the aid of the Public Trustee (of Ontario) and/or the Department of Consumer and Corporate Affairs (of Canada) to satisfy" the obligations of the company to its creditors and its stockholders "through an orderly liquidation of the Company whether in bankruptcy or otherwise, all such steps to be taken upon (a) the recommendation of Canadian counsel, (b) the concurrence of U.S. counsel, and (c) specific Telex confirmation of G. C. Roberts or J. D. Shepard and U. Strickler", it being the intention that the directors named should have some further opportunity to confirm the financial plight of the company as revealed by the Treasurer's report. It is significant that this meeting had been preceded by an informal meeting of the directors, estended also by Messrs. Vesco and LeBlanc and at which they had endorsed fully, in a "purely" consultant" le, the notion that the company should without delay be placed in bankruptcy. Further meetings of the directors have been held, without the presence of Roberts and Shepard.

These meetings are significant only in that they tend to indicate the continued desire of what may be called the Kilmorey interests to resist stoutly to the end any liquidation of IOS, even if perhaps only for reasons of delay, and to seek, notwithstanding their consent at the time, a reversal of the cancellation of the charter of Transglobal. Filed as an exhibit on this application was a declaration of Mr. Strickler, made at Costa Rica, attesting to the fact that Kilmorey, of which he claims to be president and majority shareholder, and which in turn he says holds "directly or indirectly" 42.13% of the total issued capital stock of IOS, is opposed to the winding up of IOS under the Windingup Act "as not being in the best interests of shareholders and creditors, and because the appointment of a Canadian liquidator will cause further confusion to the existing situation and will add unnecessary costs and charges to the company". Suffice it here to say that before the August 12nd resolution could be appropriately acted upon the three applications presently before me had been filed, an interim liquidator had been appointed on the first appliation, and the directors Roberts and Shepard together with the principal officers of the company outside the Kilmorey group were co-operating fully with the interim liquidator in bringing about such orderly gathering-in of the assets of the company as has up to this time been appropriate.

All of the foregoing can of course serve only to illustrate the state of complete and irrevocable disarray and impotency into which the company has fallen. If further reasons are required for the propriety of application of the just and equitable jurisdiction of the Court in ordering a winding up they may be found in the following circumstances:

A. The company is insolvent. While it has been contended otherwise, I am obliged in the absence of any concrete evidence to the contrary to accept the financial statement and report of the Treasurer, has prepared for the August 2nd - eting of directors, and the statement prepared by the Clarkson Company following appointment of the interim liquidator as indicating with substantial accuracy the true financial picture of the company. Both establish conclusively that its liabilities very substantially exceed the realizable value of its assets. While the estimate of value of some assets may of necessity be somewhat arbitrary there is little evidence on balance that they have been underestimated. Nor have the liabilities in my opinion been exaggerated. Quite apart from just and equitable considerations this state of insolvency is sufficient alone to justify the making of a winding up order. Moreover, the mere exhibiting of the Treasurer's statement of August 1st - as was done by Canadian counsel on behalf of the company to the Canadian Government authorities in August - amounted in itself to an act from which the company, under S. 3 of the Act, may be deemed insolvent. This is quite apart from other acknowledgements of insolvency which I need not detail here.

- B. Similarly, there is ample evidence, on the basis of the same statement, for a finding that the capital of the company has been impaired in a degree which under clause (d) of S.10 of the Act would warrant the making of an order. Again, in view of all the other circumstances I do not here propose to enlarge on this aspect of the issues.
 - C. There has been a consistent ignoring of the interests of the shareholders. No annual meeting has been held, or at any time even proposed, for the current year. The European plan, the adoption of which could only have been of the greatest concern to shareholders, was advanced with no reference to them for approval or comment. No financial statement was produced for the year 1972, nor was any quarterly, interim or other financial statement produced, or apparently even requested, by the officers or directors between production of the 1971 statement and the Treasurer's statement of August 1973. If the Treasurer failed in any duty to prepare such statements there is no suggestion that he was ever reprimanded in that behalf. The directors have in effect exercised virtually no

control over the financial operations of the company during that period. Senior staff members engaged in financial administration have testified that they could obtain no direction. from management. The company is now even without a Treasurer, Mr. Whitcraft having been summarily discharged in September.

- D. The company is utterly incapable of continuing any sort of business. It has no income. It cannot open a bank account. It cannot find an auditor qualified and willing to serve. Its administrative staff at its European headquarters, which served also the major subsidiaries, has been depleted from a total of fifteen hundred bodies to a caretaker corps of a few dozen. Most of those left appear to detest Strickler. Even if personnel could be found, work permits could not be obtained for them.
- E. All of the security and corporate regulatory bodies in the more important jurisdictions have blacklisted the company. It is apparent that the present applications have been sponsored and underwritten by a number of governments in a concerted effort to save what can be saved of the remaining assets of the company and of the funds for those legitimately entitled to them and to destroy the capacity of the company and its dominating interests to continue what could only be considered the same monstrous practices they have conducted in the past.

 F. The company presently finds itself engaged in over two hundred law suits. During the first six months of the current year it was obliged to meet, in ever accelerating demand, legal fees amounting to some \$1.4 million. There can be no suggestion that the trend would be reversed should the company continue in operation.
- G. There exists a most dire and urgent necessity for immediate investigation of numerous non-arms-length transactions between cartain of the principals or former principals of the company.



These investigations can only be hindered should control continue in its present hands.

- H. The company has failed to produce its minute books and company records. These it claims are impounded at Nassau under a landlord's lien for rent. But the landlord is a subsidiary of Bahamas Commonwealth Bank, a Bahamian corporation controlled by LeBlanc and the assets of which appear traceable to spun-off IOS assets.
- I. The present board of directors consists essentially of Meissner, who appears to have no immediate prospects of release from prison, Strickler, and the group of Costa Ricans, the latter being merely figureheads. Technically Roberts and Shepard are still members of the board but they refuse to deal further with the Kilmorey interests. Those two are among the handful who are the most knowledgeable concerning the present affairs of the company, and they have both testified at the present hearings, as has Mr. Whitcraft and three other senior financial staff members, that an immediate winding up is incontrovertibly in the best interests of all concerned. It is noteworthy that only three members of the present board, including Mr. Roberts, were even elected to office by the shareholders. All the other current members have been placed there by the authority, arbitrarily exercised, of either Meissner or Strickler. Technically of course it can be said that in fact none of the current directors have been elected by the shareholders as the whole board elected at the last shareholders' meeting resigned in October 1972 in favour of the Spaniards and were only arbitrarily reinstated by Meissner when the sale of Kilmorey to that group was reversed a month later.
- J. Certain of the dealings affecting the company and its operations in a major way can only be considered as patently spurious. I give as an example certain litigation in the Balanama' courts—early this year between Overseas Bevelopment bank (happalang) and the Bahamas Communicalth Bank, in which

the former sought assiduously to recover from the latter control over certain sizable mutual fund assets. The action was in April, just prior to the contemplated presentation of the European plan proposal, settled out of court. The amazing feature of this so-called litigation is that it involved two companies both of which were wholly owned subsidiaries of the same parent company - one, incidentally, owned or controlled by LeBlanc. The only analogy one can draw for such a sophisticated game of bluff is a violent quarrel between one's right hand and one's left.

K. The hearing of the current application must represent the only occasion in the history of winding up litigation in which a resisting management group has failed to call a single witness of substance to answer the allegations of an applicant and to endeavour to show in some positive and detailed fashion the justification for continuance of a company's operations and the prospect of benefits which might thereby result for the shareholders and the creditors. Even Strickler failed, in his declaration, to touch upon such matters. Here the only witness called with any intimate knowledge of the company's affairs was the company's Secretary, a salaried employee who now resides in California. His suggestion of justification was in effect limited to the notion that because management had in the immediate past encountered and reathered such a succession of crises it might reasonably be expected to be able to continue to do so. Apparently the Kilmorey interests were unable to find anyone among their number willing or able to venture here to present any logical defence.

L. The plain and simple fact of the matter is that from the outset IOS has been essentially dominated and controlled by a series of one or two individuals - from Cornfeld, through Vesco and Lablane, to Meissner - and perhaps even to strickler. All of these poor, pitiable wretches have allowed chemselves

to be consumed by a rapacious, meglomaniacal greed for money and power. Two of them are in prison and the personal freedom of the others is substantially confined to the refuge of an overseas sanctuary. Who is there to lead IOS out of the wilderness? And what trust could in any event be placed in Meissner, in whom probably reposes the current control? The answer to at least the second question may be found in a letter from Messrs. Roberts and Shepard (dictated by the former) delivered to Meissner in London by hand on April 17th last. It is in evidence and reads:

Jack and I have been very carefully discussing together the events of the past ten days with particular reference to the emergence of the text of certain letters written by you during March and very early April (quite unknown to us or even to your own personal lawyer) to the Bahamas Commonwealth Bank on behalf of the Funds and the Fund Management Companies.

Even if these letters were right to be written at all which we by no means accept, what we cannot readily forgive is your having persistently concealed from us that you were doing these things. The consequence has been that you have knowingly allowed us to make incorrect representations to Governmental Authorities in ignorance of the true facts. You even yourself attended with us a meeting in Luxembourg as recently as 5th April and permitted these misrepresentations to continue when the true position was well known to you.

This negates all the undertakings you have given us as to how, if we put at risk our own reputations in an effort to assist you personally and to save the day for all concerned, you in return would unfailingly take us into your full confidence as to every development known to you and also would take no policy steps without our prior concurrence The tenor of your hitherto secret letter of 13th March 1973 also strongly negates the story which has been fostered by you that there remains no undercover relationship between yourself on the one hand and LeBlanc on the other hand. We have worked unstintingly towards achieving your own stated ambition, which was so far as possible to preserve in full the interests of the Fundholders and of the Shareholders and to isolate those interests completely from all

other external influences, we believe with some modest degree of isaccess so far as we have been concerned, especially in the European field. We therefore resent your recent treatment of us and feel bound to say that this feeling of resentment extends to a number of instances other than merely the specific example referred

to allows.

We expect that in these circumstances you will probably consider that our usefulness to you has come to an end. If so, you will of course say so and we will then consider, in the light of advice which we ourselves must obviously obtain from suitable English and American counsel, how best our departure should be handled from the point of view of City opinion, the International Press, the S.E.C. and our own personal reputations.

We are sorry to have to write in this strain, but we do so, on the whole, "more in sorrow than in anger" since we appreciate that you are essentially a "loner" who wants his own way in everything and who considers his own amour propre as transcending even the claims of loyal intendency which we believe we have unhesitatingly shown towards you throughout.

Let us know, therefore, how you feel and we will then, when all the Easter holidays are over (i.e. about 10th May), get on at once with whatever action we may all decide is called for.

In all the circumstances it is impossible to conclude other than that the most compelling case has been made out for the issue of a winding up order under the just and equitable provision of the Act and equally so on the grounds of insolvency and impairment of capital. A winding up order in respect of IOS will issue. I shall discuss further with counsel in chambers the precise terms of the order, including designation of an appropriate liquidator or liquidators. In accordance with the arrangement made by counsel I have not here dealt with the first and second applications.

Judge of the Supreme Court

Fredericton, N. B. November 5, 1973

IN THE SUPREME COURT OF NEW BRUNSWICK

IN THE MATTER of I.O.S. Ltd

AND IN THE MATTER of three several applications for the winding up of the said company under the provisions of the Winding Up Act, Revised Statutes of Canada, Ch.W-10

JU DGMEN.T

Dickson, J

359 A Exhibit C Annexed to Affidavit of Herbert M. Wachtell

Order of Hon. Dickson, J., Dated November 5, 1973

IN THE SUPREME COURT OF NEW BRUNSWICK



IN THE MATTER OF I.O.S., LTD. and IN THE MATTER OF the Winding-up Act of Canada, Revised Statutes of Canada, 1970, Chapter W-10.

ORDER

UPON application by petition of Peter Geoffrey Wood, a shareholder of the above-named company, I.O.S., Ltd., for its winding-up; AND UPON READING the petition and its annexures; AND UPON HEARING the evidence adduced by the parties at the hearing into the said application and what was alleged by counsel for the applicant and for the company; AND UPON being satisfied that the company is one to which the Winding-up Act applies and that in all circumstances disclosed by the evidence a winding-up order should under the provisions of s. 10 of the Act be made in respect of it;

I DO ORDER that I.O.S., Ltd. be wound-up under the provisions of the Winding-up Act.

DATED this 5th day of November, 1973.

Judge of the Supreme Court

Exhibit D Annexed to Affidavit of Herbert M. Wachtell

Opinion of Supreme Court of New Brunswick, Appeal Division, Dated December 3, 1973 IN THE SUPREME COURT OF NEW BRUNSWICK

APPEAL DIVISION

IN THE MATTER OF I.O.S. LTD.

- and -

IN THE MATTER OF THE WINDING-UP ACT, R.S.C. 1970 Chap. W-10

- and -

IN THE MATTER OF AN APPLICATION BY PETER GEOFFREY WOOD FOR A WINDING-UP ORDER.

I concur:

John 7. Bugain J.A.

Coram: Hughes, C.J.N.B., Limerick and Bugold, JJ.A.

Hughes, C.J.N.B.

This is an application by I.O.S. Ltd. for leave to appeal a decision or order made November 5, 1973 by Dickson, J. whereby he ordered that I.O.S. Ltd., a company incorporated by letters patent dated January 28, 1953 under the Companies Act R.S.C. 1952, c.53, be wound-up under the provisions of the Winding-up Act, R.S.C. 1970, Chap. W-10 (herein referred to as "the Act") and appointed liquidators of the company.

Before dealing with the several grounds on which leave to appeal is sought it is desirable that the various proceedings leading up to the decision or order appealed from be reviewed. On August 30, 1973 the Queen in

right of the Province of Ontario as represented by the Public Trustee of that Province made application to Dickson, J. for a winding-up order in respect of I.O.S. Ltd. and for the appointment of a provisional liquidator pending the final determination of the application. In the application the applicant claimed to be a creditor of I.O.S. Ltd. by virtue of " vesting in the Crown in right of the Province of Ontario of the assets of Transglobal Financial Services Limited, a subsidiary of I.O.S. Ltd. (herein referred to as "Transglobal") upon the cancellation of the charter of Transglobal on July 30, 1973 under the Ontario Business Corporations Act. The assets of Transglobal included a debt of \$2.248 million which the applicant claimed was owing to Transglobal by I.O.S. Lid. Following the taking of evidence the trial Judge made an interim order dated August 30, 1973 appointing Jean Romeo Lajoie a provisional liquidator of I.O.S. Ltd. pursuant to the Winding-up Act, and adjourned the proceedings to September 13, 1973 on which date Montreal Trust Company presented another winding-up application against I.O.S. Ltd. in its capacity as a creditor, alleging that I.O.S. Ltd. owed it about \$12,000 for stock transfer fees. The proceedings were again adjourned and on October 15, 1973 a third application for a winding-up order against I.O.S. Ltd. was presented on behalf of Peter Geoffrey Wood. In his petition Mr. Wood alleged he was a shareholder of I.O.S. Ltd. and based his application on the alleged insolvency of the company, on the impairment of its capital stock and on the ground it was just and equitable that the company be wound up.

With the concurrence of counsel for the parties all of the evidence adduced, in so far as relevant to support

any of the three applications, was made applicable to all of them. It was further agreed that Mr. 'Wood's application should be considered first and that only if that application were not granted would the other two be dealt with. Following the hearing, which extended over a period of several days, the trial Judge on November 5, 1973 delivered reasons for judgment in which he found a "most compelling case" had been made out for the issue of a winding-up order under the just and equitable provisions of the Act as well as on the ground of the company's insolvency and the impairment of its capital. Following a conference with counsel for the parties as to the form in which the orders should be issued the trial Judge made the following orders:

- An order dated November 5, 1973 whereby he ordered that I.O.S. Ltd. be wound up under the provisions of the Winding-up Act;
- 2. A second order dated November 5, 1973 whereby he ordered that Jean Romeo Lajoie, Esq. and John A. G. Page, Esq. "both of whom are chartered accountants and licensed trustees in Bankruptcy be and they are hereby appointed the Liquidators of the estate and effects of I.O.S. Ltd.";
- 3. A third order dated November 5, 1973 whereby he terminated the appointment of Jean Romeo Lajoie, Esq. whom he had appointed a provisional liquidator by an order dated August 30, 1973; and
- 4. A fourth order dated November 7, 1973 whereby he ordered that notice be given to the share-holders, creditors and contributories of I.O.S. Ltd. by publication of a notice attached to the said order in certain issues of Time Magazine and of the Globe and Mail, as required by s.26 of the Winding-up Act; the said notice containing the following paragraphs:
 - " Any shareholder, creditor or contributory wishing to make any representation in that behalf has the privilege of attending before me and being heard, either personally or by counsel, at my Chambers at the Legislative Building, Fredericton, New

Brunswick, Canada, on the said day at the hour of ten o'clock in the forenoon.

The purpose of this notice is to advise the time and place when and where it is proposed to consider confirmation as aforesaid of the appointment of the Liquidators of I.O.S. Ltd. and no other representations will be entertained at that time on any other subject.

I.O.S. Ltd. seeks leave to appeal both the first and second orders above referred to on the ground the Winding-up Act is not applicable to I.O.S. Ltd. although it is a corporation incorporated under the authority of an Act of the Parliament of Canada. This contention was dealt with andrejected in a judgment to be delivered contemporaneously herewith in which I.O.S. Ltd. appealed against an order appointing a liquidator dated August 30, 1973. Leave to appeal on this ground is therefore refused.

orders on the ground Mr. Wood's application was made for a collateral purpose and lacked bona fides. In his reasons for judgment the trial Judge stated that Mr. Wood's application had "been sponsored and underwritten by a number of governments in a concerted effort to save what can be saved of the remaining assets of the company and of the funds for those legitimately entitled to them and to destroy the capacity of the company and its dominating interests to continue what could only be considered the same monstrous practices they have conducted in the past". Mr. Wood was qualified to make a a shareholder under s.ll of the Act. The fact the cost involved in making the application was underwritten by one or more of

the governments does not appear to me to be any ground for concluding he made the application for a collateral purpose or that his application was lacking in bona fides. I would accordingly refuse leave on this ground.

Two general grounds were alleged against the winding-up order: The first being that on the hearing of the applications the burden of proof was shifted to I.O.S. Ltd. to show that a winding-up order should not be made, and the second that hearsay evidence was admitted. My perusal of the reasons for judgment given by the trial Judge satisfies me that all facts essential to be proved to entitle the applicant Wood to a winding-up order were in fact established by proper evidence and I would therefore exercise my discretion not to permit the opening up of the whole case on these grounds.

A further ground on which I.O.S. Ltd. seeks

leave to appeal the order of November 5, 1973 appointing,

Mr. Lajoie and Mr. Page liquidators of the estate and effects

of I.O.S. Ltd. is that the appointments were made without

previous notice being given to the creditors, contributories

and shareholders as requied by 2.26 of the Act. This Court

has held in a judgment delivered contemporaneously herewith on

an appeal by I.O.S. Ltd. from an order appointing a provisional

liquidator that s.26 of the Act does not apply to the appointment

of a provisional liquidator appointed under the authority of

s.28 of the Act. Although the order of November 5, 1973 does

not specifically state Mr. Lajoie and Mr. Page are provisionally

appointed liquidators, the order of November 7, 1973 directing

publication of a notice to the creditors, contributories and

shareholders of I.O.S. Ltd. pursuant to s.26 of the Act, clearly indicates it was the intention of the Court to appoint the liquidators provisionally only and that in expressing its intention to do so accidentally omitted the word "provisionally" before the words "liquidators of the estate and effects of I.O.S. Ltd.". Such an omission in expressing the manifest intention of the Court may be corrected under Order 28, rule 11 of the Rules of Court by the Court that made the order.

On the hearing of the appeal, however, counsel for the parties agreed that in the event the Court of Appeal found meric in this ground it might deal with it as it would on an appeal from the order. Rule 4 of Order 58 of the Rules of Court empowers this Court to make any order which ought to have been made by the trial Judge and I would therefore order the word "provisionally" to be inserted before the words "liquidators of the estate and effects of I.O.S. Ltd." in the said order of November 5, 1973.

In my opinion leave to appeal on each of the grounds on which leave was sought should be refused except the last ground upon which I would make an order to amend the order of November 5, 1973 appointing the liquidators by inserting therein the ware "provisionally" Before the words "liquidators of the estace and effects of I.O.S. Ltd.".

As I.O.S. Ltd. has succeeded on only one of the grounds on which it has sought leave to appeal, that being one which could have been corrected by the trial Judge upon application to him, I would make so order as to costs.

Chief Justice of New Brunswark

December 3, 1973.



IN THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

IN THE MATTER OF I.C.S. LTD.

- and -

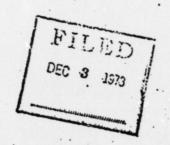
IN THE MATTER OF THE WINDING-UP ACT, R.S.C. 1970 Chap. W-10

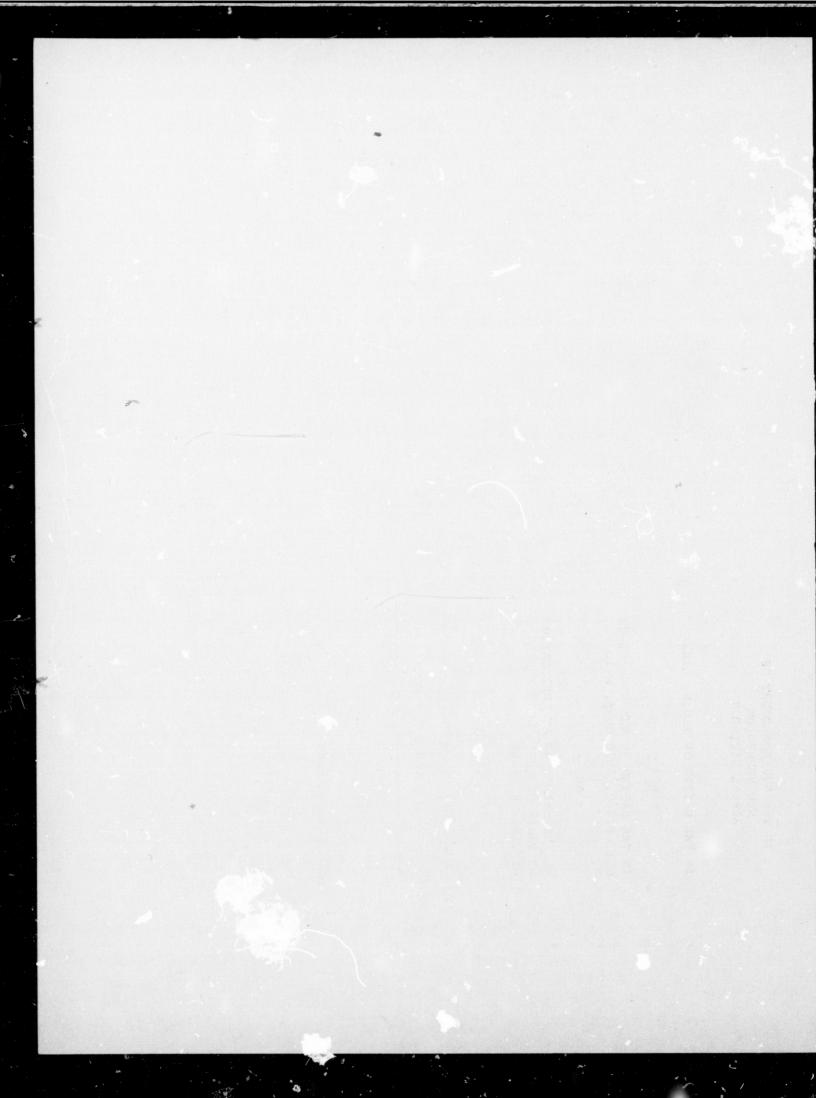
- and -

IN THE MATTER OF AN APPLICATION BY PETER GEOFFREY WOOD FOR A WINDING-UP ORDER.

JUDGMENT

Hughes, C.J.N.B.





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IN THE SUPREME COURT OF NEW BRUNSWICK

APPEAL DIVISION

IN THE MATTER OF I.O.S. LTD.

- and -

IN THE MATTER OF THE WINDING-UP ACT OF CANADA, REVISED STATUTES OF CANADA, 1970, CHAPTER W-10

- and -

IN THE MATTER OF THE PETITION OF PETER GEOFFREY WOOD FOR A WINDING-UP ORDER.

Coram: Hughes, C.J.N.B., Limerick and Bugold, JJ.A.

Limerick, J.A.

I concur with the reasons for judgment of the Chief Justice.

R. V. Limerick, J.A.

IN THE MATTER OF I.O.S. LTD.

- and -

IN THE MATTER OF THE WINDING-UP ACT OF CANADA, REVISED STATUTES OF CANADA, 1970, CHAPTER W-10

- and -

IN THE MATTER OF THE PETITION OF PETER GEOFFREY WOOD FOR A WINDING-UP ORDER

THOGMENT

Limerick, J.A.

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Exhibit E Annexed to Affidavit of Herbert M. Wachtell

Opinion of Supreme Court of New Brunswick, Appeal Division, Dated December 3, 1973 IN THE SUPREME COURT OF NEW BRUNSWICK

APPEAL DIVISION

IN THE MATTER OF I.O.S. LTD.

- and -

IN THE MATTER OF THE WINDING-UP ACT, REVISED STATUTES OF CANADA 1970, CHAPTER W-10

We concur:

TA

John J. Burne J.A.

Coram: Hughes, C.J.N.B., Limerick and Bugold, JJ.A.

Hughes, C.J.N.B.

to leave obtained therefor, from an order of Dickson, J.
dated August 30, 1973 made under the Winding-up Act, R.S.C.
1970, Chap. W-2 (herein after referred to as "the Act")
whereby he appointed Jean Romeo Lajoie to be a provisional
liquidator of the estate and effects of I.O.S. Ltd. The
order appealed from was made upon the application of Her
Majesty The Queen in right of the Province of Ontario as
represented by the Public Trustee of Ontario, who in making
application for a winding-up order claimed to be a creditor
of I.O.S. Ltd.

The appellant alleges as grounds of appeal that the crial Judge erred in making the order:

 In that he had no jurisdiction to do so under the Act;

- In that he did so on the application of the Public Trustee of Ontario when no debt was vested in the Public Trustee or if vested when the Public Trustee had no beneficial interest in the debt claimed;
- In that he made the order without service of a notice of application having been made on I.O.S.Ltd.;
- 4. In that if notice of the application was served it was not served in time for the commencement of the bearing; and
- In that he did so without complying with s.26 of the Act.

Court had no jurisdiction to make the order is based on consel's submission that a company incorporated by or under the authority of an Act of the Parliament of Canada is not within the scope of the Act unless it carries on a business in Canada which is subject to the legislative authority of the Parliament of Canada. It was urged that because the directors and managers of I.O.S. Ltd. operate from bases outside of Canada the company is not subject to the Act applies. It reads:

This Act applies to all corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the former Province of Canada, or of the Province of Nova Scotia, New Brunswick, British Columbia, Prince Edward Island or Newfoundland, and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada; and also to incorporated banks, savings banks, incorporated insurance companies, loan companies having borrowing powers, building societies having a capital stock, and incorporated trading companies doing business in Canada wherever incorporated and

⁽a) that are insolvent; or.

(b) that are in liquidation or in process of being wound up, and, on petition by any of their shareholders or creditors, assignees or liquidators ask to be brought under this Act.

As published in the Revised Statutes 1970, s.6 contains 22 lines. A semicolon following the words "Parliament of Canada" in the 10th line in effect divides the section into two distinct parts. The first part of the section is idential to s.3(1) of the Winding-up Amendment Act 1880 (Can.) c.32, except for the transposition of "Prince Edward Island" and "British Columbia" and the addition of "Newfoundland" which immediately precedes the words "and whose incorporation and the affairs whereof are subject to the legislative authority of the Parlia nt of Canada". In In re Bank of Western Canada (1968) 65 D.L.R. (2d) 381, the Manitoba Court of Appeal expressed the view that s.3 of the Act of 1889 was intended to stand on its own feet and not to modify or be modified by s.3 of the earlier Act which contained provisions substantially similar to those contained in the part of s.6 of the present Act which follow the semicolon referred to above. I respectfully concur in that interpretation of the section and it is therefore only necessary to consider whether I.O.S. Ltd. is within the purview of the first 10 lines of s.6.

Counsel for the respondent argued that the words "and whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada" found in the first 10 lines of s.6 apply only to companies incorporated by or under the authority of any Act of the former Province of Canada or of any of the provinces named in that part of the section, and that they have no

application to corporations incorporated by or under the authority of an Act of the Parliament of Canada.

The comma following "Newfoundland" in the eighth line of the section provides some indication that the words which follow it are applicable not only to companies incorporated by or under the authority of any Act of the former Province of Canada or of the other provinces named therein but also to those incorporated by or under the authority of the Parliament of Canada. Whether or not that is the correct interpretation it is my opinion that any corporation incorporated by or under the authority of an Act of the Parliament of Canada is one whose incorporation and the affairs whereof are subject to the legislative authority of the Parliament of Canada", and that the real purpose of inserting those words is as suggested by Patterson, J. in Shoolbred v. Clarke (1890) 17 S.C.R. 265 at 275 where he said:

This obviously is intended to exclude companies incorporated by provincial legistation since confederation under the exclusive legislative jurisdiction given to the Provinces.

Had Parliament intended to restrict the application of the Act to companies which are incorporated by or under the authority of an Act of the Parliament of Canada to those which did business in Canada it undoubtedly would have used the same or a similar expression to that found in the second portion of s.6 following the semicolon which makes the Act applicable to companies wherever they have been incorporated, if they are insolvent or in liquidation or in the process of being wound up and which are "doing business in Canada". In my opinion I.O.S. Ltd. clearly falls within the class of companies defined in s.6

of the Act and it follows that the Court of first instance had jurisdiction to entertain an application for the winding-up of the company and for the appointment of a liquidator.

The second ground is based on the premise that the Public Trustee of Ontario is the applicant. In my opinion the Public Trustee is the instrument by which Her Majesty in right of the Province of Ontario made the application for the winding-up order. At the time the order was made there was prima facie evidence that the applicant had a sufficient interest as a creditor to apply under the Act.

The third and fourth grounds raise two distinct questions as to the sufficiency of the service of the notice of the hearing of the application by the Judge of first instance, the first being whether the notice was served in time for a hearing on August 30, 1973 and the second whether service on Mr. E. T. Whiteraft was a valid service upon I.O.S. Ltd.

The affidavit proving service of the notice of the hearing of the application to be held Thursday, August 30, 1973 was served on Mr. Whitcraft, a person who identified himself as the Treasurer of I.O.S. Ltd., on Saturday, August 25.

of first instance shows that I.O.S. Ltd. was represented by counsel at the hearing on August 30 when he took objection to the service of the notice and subsequently was granted an adjournment to September 13 to enable him to obtain instructions from his client. On the later date the hearing was adjourned to October 15.

· Counsel for the appellant does not dispute that

Mr. Whiteraft was the Treasurer of I.O.S. Ltd. at the time service was effected on him but contends that service sould not have been made on him because, it is alleged, Mr. Whiteraft was colluding with the applicant to have the service effected on him without having obtained authority from I.O.S. Ltd. to be served on its behalf. Furthermore counsel contends that service of the notice on August 25 for a hearing to be held August 30 did not give the appellant "four days notice of the application" to which it was entitled by s.12(2) of the Act.

Court to support the contention there was any collusion between the applicant and Mr. Whiteraft nor do I see any basis for the suggestion that service of the notice on Mr. Whiteraft was not proper service on the appellant. Service on a company by service upon a creasurer of the company is authorized by rule 6(1) of Order 9 of the Rules of Court, which in the absence of any statutory provision in the Act is applicable.

As to the question whether the notice of the application was served in time, s.12(2) of the Act reads:

12. (2) Except in cases where such application is made by the company, four days notice of the application shall be given to the company before the making of the application.

Section 25(3) of the Interpretation Act, R.S.C. 1970, Chap. I-23 provides:

25. (3) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating the number of days there shall be excluded the day on which the first event happens and there shall be included the day of which the second event happens.

If these statutory provisions alone applied I think there could be no doubt that service of the notice on

August 25 for a hearing on August 30 satisfied s.12(2) of the Act. Counsel for the appellant, however, contends that certain of the Rules of Court applicable to proceedings in the Supreme Court apply to exclude both Sunday and the Saturday on which service was effected. He relies on s.138 of the Act which reads:

138. Until such forms, rules and regulations are made, the various forms and procedures, including the tariff of costs, fees and charges in cases under this Act, shall, unless otherwise specially provided, be the same as nearly as may be as those of the court in other cases.

" Rule 2 of Order 64 of the Rules of Court in effect requires that Sunday, being a holiday as defined by the Interpretation Act, R.S.N.B. 1952, c.114 be excluded in computing time allowed for the doing of an act where the time for doing such act is less than six days. Rule 11 of Order 64 provides that service of any notice made on Saturday shall be effected before the hour of one o'clock in the afternoon and if not effected by such hour it is deemed to have been effected the following Monday. The affidavit of service does not specify the hour at which the notice of the application was served on Mr. Whitcraft but counsel conceded during the course of the argument before us that the service was made at 9 a.m. In those circumstances I would conclude that even though both Rules of Court were applicable, which is not necessary to decide on this appeal, the service of the notice of the application gave the four days notice to which the appellant was entitled under s.12(2) of the Act.

The last ground of appeal is the alleged failure of the Judge of first instance to comply with s.26 of the Act

in that notice was not given to the creditors, contributories and shareholders before Mr. Lajoic was appointed a provisional liquidator. The following sections of the Act were referred to in the course of the argument in relation to this ground:

- 23. (1) The court in making the windingup order, may appoint a liquidator or more than one liquidator of the estate and effects of the company.
- 25. The court may, if it thinks fit, after the appointment of one or more liquidators, appoint an additional liquidator or liquidators.
- 26. No liquidator aforesaid shall be appointed unless a previous notice is given to the creditors, contributories and shareholders or members; and the court shall by order direct the manner and form in which such notice shall be given and the length of such notice.
- 28. The court may on the presentation of the petition for a winding-up order or at any time thereafter and before the first appointment of a liquidator appoint provisionally a liquidator of the estate and effects of the company and may limit and restrict his powers by the order appointing him.

There is no doubt that a notice to the creditors, contributories and shareholders is a condition precedent to a valid appointment of a liquidator made under the sections of the Act which precede section 26: See Shoolbred v. The Union Fire Insurance Co. (1887) 14 S.C.R. 624 and System Theatre

Operating Co. v. Pulos and Lamarre [1955] S.C.R. 448. Section 26, however, does not apply to liquidators who are provisionally appointed under the authority of s.28 of the Act which is clearly the authority under which the Judge of first instance appointed Mr. Lajoie by the order dated August 30, 1973.

In my opinion the appeal fails on all grounds relied on and should be dismissed with costs.to be taxed under column 3.

Chief Justice of New Druns

IN THE SUPREME COURT OF NEW BRUNSWICK APPEAL DIVISION

IN THE MATTER OF I.O.S. LTD.

- and -

IN THE MATTER OF THE WINDING-UP ACT, REVISED STATUTES OF CANADA 1970, CHAPTER W-10

JUDGMENT

Hughes, C.J.N.B.

VII.BD

3 4.10

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Exhibit F Annexed to A fidavit of Herbert M. Wachtell

Order of Hon. Dickson, J., Dated November 5, 1973

THE SUPREME COURT OF NEW BRU, SWICK



IN THE MATTER OF I.O.S., LTD.

AND IN THE MATTER OF the Windingup Act of Canada, Revised Statutes of Canada, 1970, Chapter W-10.

ORDER

UPON APPLICATION by petition of Peter Geoffrey Wood, a shareholder of the above-named company 1.0.5., Ltd. for its winding-up; AND HAVING MADE a winding-up order under the provisions of the Winding-up Act in respect of the company; AND UPON HEARING representations of counsel concerning the appointment of Liquidators of the company;

- I DO HEREBY ORDER that Jean Romeo Lajoie, Esq., of the City of Ottawa, an employee of the Department of Consumer and Corporate Affairs of the Government of Canada, and John A. G. Page, Esq., of the City of Fredericton, in the Province of New Brunswick, both of whom are Chartered Accountants and Licensed Trustees in Bankruptcy, be and they are hereby appointed the Liquidators of the estate and effects of I.O.S., Ltd.
- AND I DO FURTHER ORDER as follows:
 - That the Liquidators be and they are hereby authorized (without affecting their right to retain other agents) to retain The Clarkson Company Limited as their agent with authority to do on their behalf such acts as they deem appropriate;
 - (b) That the Liquidators and their said agent, The Clarkson Company Limited, may appoint such solicitors or lawyers in Canada and elsewhere as they respectively deem necessary to assist them in falfilling their duties;

- the powers conferred upon them by The
 Winding-up Act, which powers may be
 exercised without the approval, sanction
 or intervention of the Court and without
 prior notice to the credit,
 contributories or shareholders of I.O.S.,
 Ltd.
- (d) That the Liquidators shall report to this

 Court on their administration of the

 estate and effects of I.O.S., Ltd. at

 intervals not to exceed six months or as

 may be required by the Court;
- (e) That any act done by one of the Liquidators in connection with the administration of the estate shall be presumed to be an act done by both of them jointly;
- (f) That it shall be unnecessary for the Liquidators hereunder appointed to file any security in respect of the performance of their duties;
- to be deposited in a Canadian Chartered Bank all sums of money which may from time to time come into their hands; provided that whenever they have monies in their hands in any jurisdiction from which it is not in their or their agent's opinion reasonably expedient to transfer the same to the relevant Canadian Chartered Bank, they may deposit or cause to be deposited such monies in any bank that is authorized to carry on business in the relevant jurisdiction.

DATED this 5th of Beyeaber, 1973.

Judge of the Supreme Course

III	THE	SUPREME	COURT	OF	NEW	BRUNSWICK

IN THE MATTER OF I.O.S., LTD.

AND IN THE MATTER OF the Winding-up Act of Canada, Revised Statutes of Canada, 1970, Chapter W-10.

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Notice of Motion of I.O.S., Ltd. for Reargument or Certification, dated December 13, 1974

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

HOWARD BERSCH,

Plaintiff.

-against-

71 Civ. 5373 (R.L.C.)

DREXEL FIRESTONE, INC., DREXEL HARRIMAN:
RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL
& CO., LIMITED, GUINESS MAHON & CO., :
LIMITED, PIERSON, HELDRING & PIERSON,
SMITH, BARNEY & CO., INCORPORATED, J. H.:
CRANG & CO., INVESTORS OVERSEAS BANK
LIMITED, ARTHUR ANDERSEN & CO., I.O.S., :
LTD., and BERNARD CORNFELD,

NOTICE OF MOTION

Defendants.

PLEASE TAKE NOTICE that upon the annexed memorandum and the affidavits of Bernard Mindich, sworn to the 13th day of December 1974, and Kenneth L. Beaugrand, sworn to the 12th day of December 1974, and all prior papers and proceedings herein, the undersigned will move this Court, before the Honorable Robert L. Carter, on the 23rd day of December 1974, at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, for an order:

- (a) pursuant to Rule 9(m) of the General Rules of this Court granting reargument of the motions heretofore made on behalf of defendant I.O.S., Ltd. (now in liquidation)
 - (i) for a stay of all proceedings herein as against said defendant under applicable principles of international comity; and
 - (ii) for dismissal of the complaint as against
 I.O.S., Ltd. pursuant to Rules 41(b) and 12(b)(5)

of the Federal Rules of Civil Procedure; and

(b) alternatively, pursuant to 28 U.S.C. § 1292(b),

for certification for an immediate appeal of the controlling questions of law placed in issue by the aforesaid

motions of defendant I.O.S., Ltd.;

and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York December 13, 1974

WACHTELL, LIPTON, ROSEN & KATZ

By FRAMIN Myn A Member of the Firm

Attorneys for Defendant I.O.S., Ltd. (now in liquidation) 299 Park Avenue New York, New York 10017 (212) 371-9200

TO: SILVERMAN & HARNES
Attorneys for Plaintiff
75 Rockefeller Plaza
New York, New York 10019

SULLIVAN & CROMWELL
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Drexel Firestone, Inc.
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DAVIS POLK & WARDWELL
Attorneys for Defendants
Banque Rothschild
Smith, Barney & Co., Incorporated
One Chase Manhattan Plaza
New York, New York 10005

BREED, ABBOTT & MORGAN Attorneys for Defendant Arthur Andersen & Co. One Chase Manhattan Plaza New York, New York 10005

PAUL WEISS RIFKIND WHARTON & GARRISON Attorneys for Defendants Investors Overseas Bank Limited 345 Park Avenue New York, New York 10022

GOLD, FARRELL & MARKS
Attorneys for Defendant
Bernard Cornfeld
595 Madison Avenue
New York, New York 10022

WILLKIE FARR & GALLAGHER Attorneys for Defendant J. H. Crang & Co. One Chase Manhattan Plaza New York, New York 10005 384 A

Affidavit of Bernard Mindich in Support of I.O.S., Ltd.'s Motion for Reargument or Certification

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

HOWARD BERSCH,

Plaintiff,

-against- : 71 Civ. 5373 (R.L.C.)

DREXEL FIRESTONE, INC., DREXEL HARRIMAN:
RIPLEY, BANQUE ROTHSCHILD, HILL SAMUEL
& CO., LIMITED, GUINESS MAHON & CO.,:
LIMITED, PIERSON, HELDRING & PIERSON,
SMITH, EARNEY & CO., INCORPORATED, J. H.:
CRANG & CO., INVESTORS OVERSEAS BANK
LIMITED, ARTHUR ANDERSEN & CO., I.O.S.,:
LTD., and BERNARD CORNFELD,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)

ss.:

COUNTY OF NEW YORK)

BERNARD MINDICH, being duly sworn, deposes and says that he is a member of the firm of Wachtell, Lipton, Rosen & Katz, attorneys for defendant I.O.S., Ltd. ("IOS") as now in liquidation and represented by its Court-appointed Co-Liquidators.

- 1. This affidavit is submitted in support of the motion made and filed herewith for certification for an immediate appeal, pursuant to 28 U.S.C. § 1292(b), of the controlling questions of law recently decided by this Court in denying IOS' motions (a) for a stay of proceedings as against IOS and (b) for dismissal of the complaint as against IOS. Said motions were denied in an Opinion and Order of this Court filed herein on November 27, 1974.
- 2. The instant motion for certification under § 1292(b) is made alternatively to a motion for reargument of IOS' motions

to stay or dismiss this action, pursuant to Rule 9(m) of the General Rules of this Court.* As required by said Rule the facts and authorities relating to the motion for reargument are set forth in a memorandum which is being filed at the same time as this affidavit (the "IOS memorandum"). Each of the arguments in support of the alternative motion for certification are also set forth in the aforesaid IOS memorandum.**

3. This affidavit is made for the limited -- but, it is submitted, highly relevant -- purpose of setting before the Court certain facts relating to the Court's denial of IOS' dismissal motion insofar as that motion was based upon plaintiff's failure to prosecute this action diligent, as against IOS, in contravention of Rule 41(b) of the Federal Rules of Civil Procedure. Specifically this affidavit is addressed to the Court's holding that IOS was not prejudiced by the admitted delay and neglect of plaintiff in making even arguably valid service of process on IOS. The Court is also respectfully referred to the Affidavit of Herbert M. Wachtell originally submitted herein in support of IOS' dismissal motion on this issue (hereinafter cited as "Wachtell Dismissal Aff.") ¶¶ 24-26. While it is believed that the Court erred in even considering the issue of prejudice in

^{*} While neither reargument nor certification is sought of this Court's determination that there is a proper basis for personal jurisdiction over IOS, no acquiescence in that decision is intended. Rather it is believed that the questions relevant to the personal jurisdiction issue are as a practical matter substantially identical to the questions relating to subject matter jurisdiction, which the Court has previously certified under § 1292(b) and as to which IOS has filed a petition for leave to appeal to the Second Circuit.

^{**} It is noted that IOS has not previously made application for certification under § 1292(b) of any questions presented by the motions involved here.

light of plaintiff's failure to show in any way that his nonprosecution was excusable (see IOS memorandum, pp. 11-15), it is
respectfully submitted that there is a substantial basis for disagreement as to whether, assuming the issue of prejudice to IOS
was properly considered, the Court's decision that there was no
prejudice attributable to plaintiff's failure to prosecute is consistent with the facts and controlling authorities on this point.

4. Thus the Court responded to IOS' detailed showing of prejudice by stating that:

I am reasonably convinced that any 'prejudice' suffered by [defendant] I.O.S. * * * has resulted from the passage of time rather than from the service delay. Even had I.O.S. been served the same day the action was commenced, its ability to defend itself would have been affected by changes in personnel and control.

-- Opinion, p. 46

alia, the chronology of the prior proceedings in this action.

Indeed, "had IOS been served the same day the action was commenced," i.e. on December 7, 1971 rather than in Pebruary 1974 — the date of the New Brunswick service which the Court has upheld—IOS could have participated in the proceedings on plaintiff's motion for a class action determination, which motion was filed on April 2, 1972 and decided by Judge Frankel on June 27, 1972 (adversely to IOS' interests), months before plaintiff even attempted to serve IOS. Likewise "had IOS been served" in 1971—or for that matter in 1972 or even early 1973—IOS could have participated in the plaintiff's discovery in connection with the jurisdictional issue which was taken during the Spring and Summer of 1973 (discovery on the basis of which the court found subject

matter jurisdiction herein, contrary to IOS' interests). Yet by reason of plaintiff's neglect to serve IOS in a timely manner, IOS was completely denied an opportunity to be represented in both these crucial phases of this litigation.

- Moreover quite apart from plaintiff's denial to IOS of an opportunity to participate in matters initiated by plaintiff himself, the Court's conclusions on the prejudice issue overlook the realities of how IOS' counsel would have proceeded "had IOS been served the same day the action was commenced". Thus, IOS' counsel would doubtless have interviewed the responsible IOS officials to develop an understanding of the facts of IOS' role in the 1969 offerings. Counsel likewise would have gathered and analyzed the relevant documents in IOS' possession. Indeed, in light of the undeniable fact that the class action and jurisdiction issues are closely intertwined with the merits of this action, counsel would also have had an opportunity in the course of participating in those proceedings to prepare for its defense on the merits of this action. Nevertheless by reason of plaintiff's delay in even attempting to serve IOS with process -and only by reason of this delay -- there was no opportunity to take these steps when they could most feasibly have been taken.
- 7. In this last connection it is noted that it is no longer possible to take the above-stated steps at this time. Nor could IOS have done so in February, 1974 at the time of the alleged "service" at the New Brunswick Address.* By the time

In fact neither IOS' counsel nor its Co-Liquidators received any notice of that alleged "service" until July, 1974 when plaintiff first revealed it in his answering memorandum on IOS' dismissal motion.

that "service" was made, the prior responsible officials of IOS had long since been displaced, first by Robert L. Vesco and his associates, and, more recently, in the aftermath of the now notorious "Vesco era", by the Co-Liquidators represented by your deponent's firm. Moreover, the Co-Liquidators and their agents have found that by virtue of the numerous changes in personnel and control which have taken place during the interim of plaintiff's delays, the records and other documents of IOS have been scattered, lost or otherwise rendered inaccessible. Had plaintiff properly served IOS early in the proceedings those records would undoubtedly have been gathered and preserved.

8. Perhaps the most significant prejudic which IOS has suffered by reason of plaintiff's delays in his prosecution herein is the loss of any reasonable opportunity to interview or depose Mr. Edward Cowett, who died in April, 1974. Mr. Cowett was a former high IOS official who was indisputably a key figure in the IOS 1969 stock offerings which are the subject of this action. By virtue of plaintiff's delay in properly bringing IOS into this action, IOS heretofore had no reason to perpetuate the testimony of Mr. Cowett or to otherwise question him or take statements from him with respect to the issues involved in this case. IOS is now, however, foreclosed forever from utilizing the knowledge and background of Mr. Cowett.*

^{*} Mr. Cowett's importance to IOS' role in this action was particularly emphasized by the Court's own Opinion since it was chiefly the conduct of Mr. Cowett in the United States upon which the Court's findings of both personal and subject matter jurisdiction were based. (See, e.g., Opinion, pp. 21, 25, 36.) Mr. Cowett's significance in this case and the prejudice that has resulted from his untimely death is further confirmed in the affidavit annexed hereto of Mr. Kenneth L. Beaugrand, a former employee of IOS who was familiar with the 1969 offer-

- 9. The crucial significance of Mr. Cowett's death to the determination of IOS' Rule 41(b) motion is demonstrated by the Second Circuit opinion in Tradeways, Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir. 1965), cited and discussed in the IOS memorandum filed herewith, pp. 16-20. As indicated there, Tradeways establishes that the death of a key potential witness such as Mr. Cowett is, in and of itself, a prejudice which requires dismissal of the action where the plaintiff was guilty of a lack of diligence (excusable or not) in prosecuting the action. Indeed the Second Circuit noted that in these circumstances it would be "an abuse of discretion" not to grant the requested dismissal (342 F.2d at 352). As noted in the IOS memorandum, Mr. Cowett's death presents an a fortiori case for application of the principle of the Tradeways decision (see IOS memorandum, p. 18).
- above "resulted from the passage of time" seemingly ignores the fact that "the passage of time" would not have been prejudicial but for plaintiff's lengthy failure during that time to litigate this action responsibly as against IOS. It is respectfully submitted that unless the Court is assuming that even if IOS had been served in a timely manner, it would nonetheless have sat by and allowed time to pass (notwithstanding that the complaint seeks damages of \$110,000,000 from it), the quoted conclusion is logically untenable. Moreover, given the fact that IOS, even through

ings and particularly with Mr. Cowett's role therein. (As the Court will note the copy of Mr. Beaugrand's affidavit submitted herewith is in the form of a telex wired to your deponent on December 12, 1974. Mr. Beaugrand has mailed an executed copy of the actual affidavit to your deponent and upon receipt thereof it will be filed with the Court.)

its prior management, has demonstrated repeated diligence in defending itself in actions pending in this very court,* it is clear as a practical matter that IOS would have taken all steps necessary to defend itself herein, including, inter alia, obtaining from Mr. Cowett the crucial information which he, and only he, could have provided. Likewise, IOS clearly would have participated in the prior discovery proceedings and motions which were had and decided herein long before plaintiff's deficient attempts at service.

- issue herein took no account of the fact that, by the time plaintiff finally got around to "serving" IOS in a manner found proper by the Court, IOS had already -- many months before -- gone into liquidation. Thus as a result of plaintiff's failure to prosecute, the burden of defending this action would now fall, not on an operating company, but on the estate of an insolvent company being wound up in the interests of its creditors and shareholders pursuant to the decisions of an international governmental committee (see Wachtell Stay Aff. ¶ 4; IOS memorandum, pp. 3-5). This fact is highly relevant to the prejudice issue inasmuch as that issue must now be considered not as if only the private interests of an ordinary corporate defendant were at stake, but in light of the international public interest in the orderly and economical administration of an insolvent multinational corporation.
- 12. It is therefore submitted that, assuming without conceding that the issue of prejudice was properly considered in

^{*} See Affidavit of Herbert M. Wachtell in support of IOS' motion to stay [hereinafter cited as "Wachtell Stay Aff."] ¶ 13; Wachtell Dismissal Aff. ¶ 12).

deciding IOS' motion, there is a substantial basis for a difference of opinion with respect to the Court's analysis of the prejudice issue. Furthermore, since a reversal of the determination that IOS was not prejudiced by plaintiff's dilatory conduct would result in dismissal of the complaint as against IOS, an immediate appeal may materially advance the ultimate termination of the litigation.

WHEREFORE it is respectfully requested, in the event that the court denies IOS' primary motion for reargument and/or otherwise adheres to its original opinion, that IOS' motion for certification, pursuant to 28 U.S.C. § 1292(b) be in all respects granted.

Bernard Mindich

Sworn to before me this 13th day of December 1974.

Notary Public

JOANNE DIPERI
NOTARY PUBLIC, State of New York
No. 24-60-21975
Qualified in Kines County
Commission Rapires March 30, 18 26

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Affidavit of Kenneth L. Beaugrand in Support of I.O.S., Ltd.'s Motion for Reargument or Certification

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK		
	- x	
HOWARD BERSCH,		
Plaintiff,	:	
-against-	:	71 Civ. 5373 (R.L.C.)
DREXEL FIRESTONE, INC., DREXEL HARRIMAN RIPLEY, BANQUE ROTHSCHILD,	:	(1.2.0.)
HILL SAMUEL & CO., LIMITED, GUINESS MAHON & CO., LIMITED, PIERSON,	:	AFFIDAVIT
HELDRING & PIERSON, SMITH, BARNEY & CO., INCORPORATED, J. H. CRANG & CO.,	:	
INVESTORS OVERSEAS BANK LIMITED, ARTHUR ANDERSEN & CO., I.O.S., LTD.,	:	
and BERNARD CORNFELD.	: -	
Defendants.	:	

AFFIDAVIT

I, KENNETH L. BEAUGRAND being duly sworn, depose and say that:

- I am an Attorney-At-Law and a member of the Bar of the United States District Court for the Southern District of New York, and am currently associated with the firm of Aird, Zimmerman & Berlis of Toronto, Canada.
- 2. I was formerly employed by I.O.S., Ltd. a

 defendant in a matter entitled Bersch v

 Drexel Firestone Inc., et al, and was

 employed by I.O.S., Ltd. during the year 1969.
- 3. During my employment with I.O.S., Ltd. I had responsibilities in connection with three offerings of I.O.S., Ltd. common stock in 1969, which offerings I understand are at issue in the above action.

4. Throughout this period, the offerings in so far as I.O.S., Ltd. was involved in them were under the direct active supervision of the late Edward M. Cowett. He had responsibilities in connection with the negotiation of the aforesaid offerings, and in connection with the preparation and review of the documents used in the offerings. Under any view, he was a key figure in the offerings in so far as I.O.S., Ltd. was concerned.

Kunter Branfand

SWORN to before me this
12th day of December, 1974.

A Commissioner, etc.



